Supreme Court of the United States.

OCTOBER TERM, 1911.

CHARLES F. STAPLES, IRA B. MILLS, CHARLES E. ELMQUIST, AS RAILWAY COMMISSIONERS, AND GEORGE T. SIMPSON, AS ATTORNEY GENERAL,

Appellants,

VS.

DAVID C. SHEPARD, NORTHERN PACIFIC RAILWAY COMPANY, ET AL.,

Respondents.

APPEAL FROM UNITED STATES CIRCUIT COURT OF DISTRICT OF MINNESOTA, THIRD DIVISION.

CHARLES F. STAPLES, IRA B. MILLS, CHARLES E. ELMQUIST, AS RAILWAY COMMISSIONERS, AND GEORGE T. SIMPSON, AS ATTORNEY GENERAL,

Appellants,

VS.

JOHN S. KENNEDY, GREAT NORTHERN RAILWAY COMPANY, ET AL.,

Respondents.

APPEAL FROM UNITED STATES CIRCUIT COURT OF DISTRICT OF MINNESOTA, THIRD DIVISION.

CHARLES F. STAPLES, IRA B. MILLS, CHARLES E. ELMQUIST, AS RAILWAY COMMISSIONERS, AND GEORGE T. SIMPSON, AS ATTORNEY GENERAL,
Appellants,

vs.

WILLIAM SHILLABER, MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, ET AL.,
Respondents.

APPEAL FROM UNITED STATES CIRCUIT COURT OF DISTRICT OF MINNESOTA, THIRD DIVISION.

PETITION.

The Decrees in the above entitled suits, which are brought into this Supreme Court for review, require the consideration by it of the Commerce Clause of the United States Constitution and the XIVth Amendment to that Constitution—the questions of interference with interstate commerce and confiscation of the railroad companies' property. Both questions are of great importance, because, if the proposition asserted by the trial court, that the Minnesota rates involved in the suits are void because an interference with interstate commerce be approved by this Court, it virtually wipes out the power of the states to fix rates; and if the proposition asserted by the trial court as to confiscation be approved by this court, thence forth not only the power of the states to fix railroad rates,

but also the power of Congress to fix such rates is, for all practical purposes, completely paralyzed.

I was one of the counsel for appellants throughout the trial of the cases in the lower court, participated in the taking of the testimony and in the submission of the case to the Master, and in the proceedings wherein his report was considered by Judge Sanborn. During the three years of my connection with the case I made careful study of the decisions of this court bearing on the questions involved and of the evidence. I was one of the two counsel for the Appellants who argued the cases before the Master and before Judge Sanborn, and the only one who argued or presented for consideration the propositions of law presented in the printed argument which follows this petition. My study of the evidence, and of the decisions of this court have led me to the conclusion (assuming this court will reach the question of confiscation or the reasonableness of the rates), that the propositions of law considered in the appended argument, on the facts presented in the Minnesota cases, must be considered and decided by this Court on these appeals; that they are vital to the Minnesota cases and lie at the foundation of the law of confiscation and reasonableness of rates; and that they are not foreclosed by former decisions but are yet open questions in this court.

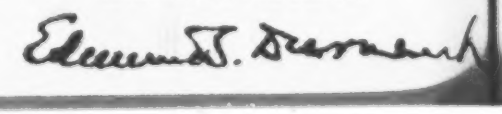
These propositions of law and their bearing on these cases ought to be called to the attention, and to have the consideration of this court when reviewing the judgments in the above entitled suits.

From knowledge gained, through my association with them in the trial of the cases in the lower court, of the attitude of mind of counsel for Appellants on these appeals toward the propositions of law in question, I have reason to suppose they will not be called fully to the attention of the court by them. The suits are of great public importance. So far as the Appellants are concerned, they involve public questions and public rights only, and not private rights or private property. Every citizen of the State is as much interested in and affected by the judgments as are the Appellants, and in fairness (though not techniucally), as much entitled to be heard. Under the circumstances, feeling that I have something of importance to offer which the Court ought to consider, I feel that I am justified in asking leave to file the argument appended hereto in aid of the above entitled appeals.

I have not attempted to cover the entire ground of confiscation and reasonableness of rates as presented on the records in these suits. I have aimed to ma[illegible]y argument supplemental to the briefs which the counsel representing Appellants on these appeals will file, and to confine myself to a short presentation and application of the basic rules or principles applicable which seem to me to require this Court to reverse the lower Court.

I therefore respectfully request permission to file with this Court for consideration on the above entitled appeals the brief or printed argument following and appended hereto.

EDMUND S. DURMENT.



Argument.

It looks as if, with the appeals in the Minnesota cases, the time and occasion have arrived when the decision of this Court must make it clear the legislative branches of the Government (State and Federal) may exercise some *effective practical* control of railroad rates, and show how it is possible for them to do so; or settle it, as a practical proposition, that governmental control of railroad rates rests in theory only and cannot be exercised so as to give any relief to the public. It must be clear to every one, that if rates must be held void when a Court, on the evidence produced before it, considered by it in the same manner and according to the same rules as in ordinary actions involving private rights only, shall be of opinion they will not return a fair rate of profit on the value of the property used in earning the return (the value, and what is a fair rate of profit to be determined by the Court on the evidence as fact), then the State, in reality, is practically powerless in the premises. Everybody knows that in practice, if the validity of the rates must depend on the result of a contest between persons supposed to represent the State and persons representing the railroads, in piling up before the Court testimony as to the value of the railroad properties, as to the amount of returns which the rates do or will bring in, as to the costs of operation, maintenance, repair and depreciation, and as to what rate of profit ought

to be allowed considering the risks and exigencies of the business, the railroads will get together the biggest pile of testimony, from the greatest number of witnesses who have had "practical railroad experience," and, barring an accident or mere chance of luck, the State will lose the contest and the rates be declared invalid. It is true the law is not an exact science, and is uncertain, but it does not seem reasonable that one of the three co-ordinate branches of our government should be held to exercise its constitutional functions in accordance with a rule of so little exactness and of such great uncertainty. Such rule necessarily would permit the courts to eliminate entirely from the result the judgment of the rate making body, and in practice give the courts the power of veto over legislative action. Of course, if the fundamental law of our Government places the legislative branch of the Government in such position of disadvantage, and so hampers it and makes its judgment so subservient to the judgment of the courts, then it is the law and we must submit. But I believe no such rule is to be found in our fundamental law, and if not, then, the courts have no right to declare such rule to exist. The decisions of this Court, properly interpreted, do not announce such to be the rule, nor justify the claim that it is.

This matter is of far greater importance than in its effect on the individual states, for it strikes at the very foundation of governmental regulation of rates, whether attempted by the state legislatures or by the Federal Congress, because the rules

for measuring confiscation by making rates must be the same for both the Federal and State Governments.

That a state has the right to regulate railroad rates necessarily contemplates and intends that it shall regulate them for some purpose and to some end, not whimsically, nor arbitrarily and for no reason whatever. That purpose or end is the *public welfare.* It necessarily is implied that it has the right and power to regulate rates to the extent and in the manner necessary to accomplish the purpose for which the power is given; and this further necessarily implies the right to judge and determine what the public good requires and what is necessary to accomplish it. The purpose for which the power was given is necesarily a limitation upon the right to exercise it, and there also may be express constitutional limitations upon its exercise; but the Constitution has not taken away the right of the State to sit in judgment on what the public good requires and what is necessary to accomplish it, nor has it given the courts the right of veto over its legislative action. The courts are not guardians nor supervisors over legislatures; nor, on the other hand, can legislatures ignore courts, and insist that their acts, simply because legislatures have enacted them, must be accepted by the courts without question. Each, legislatures and courts, have their separate fields of exclusive jurisdiction, and there ought to be a rule, clear,

reasonable and practical in application, by which the actions of legislatures and courts may be measured and each kept within its proper bounds and yet full operation of the powers of each be permitted without in anywise hampering or interfering one with the other. It is my purpose to demonstrate that such a rule exists, that under it the Minnesota rates must be held valid on the record before the Court; and that if on the record now before the Court, they do not appear to be valid, yet the judgments must be reversed for another trial of the suits because the Master and the Court ignored the rule.

The Master found (a) The values of the properties in Minnesota used by the railroads in both inter and intra state business, (b) The values of the properties used in intra business only, (c) The earnings which the railroads would have made on the intra business had the Minnesota rates which are attacked in these suits been enforced, (d) The cost of earning them, (including in "Cost," the cost of operation, maintenance, repair, depreciation, and taxes), (e) The amounts of profits which would have been realized by the railroads, and (f) The rates per cent of profit, based on the values of the properties used in intra state business, to be as follows: *

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Year & Road	(a) Total Values of Properties in Minnesota	(b) Values of Properties used in intra-state business	(c) Intra Earnings which would have been made with Minnesota rates in force	(d) COST.	(e) Profit on intra bussiness.	(f) Rate per cent. of profit on Value
1908 N. P.	$90,204,545	$19,027,619	$2,876,418.59	$2,344,343.40	$532,075.19	2.79%
1908 G. N.	138,425,291	30,685,833	4,554,568.15	3,611,027.40	943,540.75	3 + %
1907 M&StL	21,608,464	8,101,013.15	.....	.....	200,903.18	2.47%

*NOTE:

In the N. P. and G. N. cases the Master found the Values of property used for intra freight and passenger separately, and I have taken the sum of the two in the above tabulation; also, I have deducted from the Earnings and Net Profits as found by the Master the losses which he finds would have been sustained on intrastate business if the Minnesota rates which were not put into effect by the roads had been in force. See Master's printed report,—for N. P. Valuations, pp. 102, 103,—for G. N. Valuations, p. 105,—for other figures, N. P. tabulation between pp. 126 and 127, G. N. tabulation between pp. 134 and 135. For M. & St. L. figures see Master's printed report, pp. 139, 140 and 147, 148. I have computed the rate per cent profit, by dividing the total intrastate profit by the total intrastate value.

Having found the values and profits to be as above set out, the Master concluded and ruled, and the Circuit Judge affirmed, that the Minnesota rates were in contravention of the United States Constitution XIVth Amendment and therefore void;—not because the enforcement of the rates would result in any of the property used by the railroad companies in intrastate business being taken, or require the railroads to perform any service for the public without a profitable return for the service, since according to the Findings, the title, possession and control of the properties remained in the railroad companies, and the rates would afford a return sufficient to enable the roads to maintain and operate the properties, and replace them as they should wear out or be destroyed, and in addition pay the roads large sums for profits;—but solely *because in the opinion of the Master (based on the evidence before him), the profits would not be sufficiently high percentages of what in his opinion the values of the properties are.*—

This conclusion was reached by erroneously assuming two propositions to be the law, which propositions may be stated fairly as follows:

First. Legislative made railroad rates contravene the XIVth Amendment, unless in practice they will produce a return sufficient to pay all cost of operation, maintenance and repair, provide a sufficient fund to replace depreciation, and in addition pay a reasonable profit,—such profit to be a reasonable percentage of the value of the property used in the service; or, in effect, the XIVth Amend-

ment, as against legislative rates prescribed in the interest of the general public welfare, guarantees to the owners of railroad property the opportunity to employ it at a profit.

This proposition is erroneous (a) in that it assumes that the privilege or opportunity to earn profits by the use of property is itself property, within the meaning of the XIVth Amendment; and (b) in that it assumes "Unreasonable rates" and "Taking of property" to be, in law, one the equivalent of the other.

Second. The value of the property, and what percentage thereof (or amount) of profit is required in order to bring the profit up to the standard "reasonable," are to be determined by the Master or Court on the evidence as questions of fact, and in the same manner and according to the same rules applicable in ordinary equity actions between private individuals which involve private rights only; even the presumption that the legislative rates are valid is overcome or neutralized, by the presumption that the Findings of the Master are correct.

This proposition is erroneous (a) in that it excludes from consideration the fact that the matter in controversy is a governmental right or power, and the question to be determined the validity of an attempted exercise of the police power, and (b) in that it assumes the word "reasonable," when it is said the rates fixed by legislative authority must be reasonable, or afford a reasonable return, is used in the sense of a measure of quantity or

amount, whereas, in such case, as always when it is used as a measure of the validity of an attempted exercise of the police power, it is used in the sense opposite to arbitrary, i. e. "not arbitrary," and (c) in that it wholly deprives the State of the protection and benefit of the presumption that its legislative acts are valid, and of the rule as to the burden of proof requiring their invalidity to be clearly proved.

The Constitution of Minnesota does not in terms confer on the legislature the right or power to prescribe or regulate railroad rates. The power to do so rests in the legislature by virtue of its right and duty to legislate for the public welfare. In short, the right of the State through its legislature to fix or regulate railroad rates is to be found in its "police power." It cannot be placed elsewhere. The police power, of course, is not unlimited, nor unrestricted. There are certain limitations of it, and restrictions upon its exercise, which are well settled in the law,—but within those limitations and restrictions the legislature is supreme and its acts beyond control or review by the Courts. The United States Constitution, XIVth Amendment, is a limitation of the police power of the States—200 *U. S.*, 592, 594, *C. B. & Q. R. Co., State of Ill. ex rel. Quinby.* Another limitation (imposed by the very nature or purpose of the power) is that of reasonableness. The act must be reasonable, i. e. not arbitrary; which means, generally speaking, the situation must be such that the legislature in the

exercise of an honest judgment may reasonably be of opinion a public evil exists which the public welfare requires shall be corrected or mitigated, and that the remedy provided shall have some fair relation to the evil and tend to correct or mitigate it.

The question in these Minnesota Rate cases is,—Did the State in prescribing the rates in question, overstep these limitations upon the exercise of its police power? The answer, so far as it depends on the first mentioned limitation, is to be found chiefly by determining whether the enforcement of the rates *would result in taking any property.* So far as it depends on the other limitation, it is to be found by determining whether the legislature in fixing the rates acted reasonably and in the exercise of an honest judgment, and not by determining whether in the opinion of the Court the rates themselves are reasonable.

The Minnesota rates in controversy, if enforced, would not result in a violation of the XIVth Amendment.

The Findings of the Master make it clear that the enforcement of the rates would not result in the taking of any of the property used by the roads in the intrastate business, nor in requiring the roads to serve the public without profit, for he finds the returns, with the controverted rates in effect, would be ample to pay all costs of operation and upkeep (i. e. keep and operate the properties perpetually in their present condition of repair and efficiency) and pay considerable amounts in profits.

In order to hold that the enforcement of the rates would result in the taking of property, the Court must hold that the right or opportunity to earn profits is property, within the meaning of the XIVth Amendment, which it clearly is not. If the right or opportunity to earn profits be property, then logically it would seem the right or opportunity to earn 50% profit is property within the protection of the Constitution just as much as is the right or opportunity to earn 7% profit. Yet no one will claim that the right or opportunity to make 50% profit may not constitutionally be curtailed, for if it cannot be, then, neither state nor federal government can fix railroad rates at all. The Courts have said, repeatedly, it is not necessary to the validity of rates made by legislative authority that they shall afford a profit; that they ought to afford a profit, but under some circumstances and conditions they will be valid though they afford no profit.

I do not claim that the validity of such rates necessarily is to be determined without regard to profits. But I do assert that the question of the amount of profits does not enter into the determination of the question whether the rates contravene the provision of the United States Constitution as to taking property. The question of the amount of profit may be considered and have a bearing in determining whether the State in prescribing the rates in question, has exceeded the limitation of "reasonableness" which restricts the exercise of the police power, but not in determining

whether property has been taken. This is not "a distinction without a difference," but is an important, and, in the cases now under consideration, may be a vital, distinction as will appear further on in the course of the Argument. The Constitutional provision is general, and contains no exceptions, and it is inconceivable that the courts may say that in some rate cases the right or opportunity to earn profits is property, entitled to protection of the Constitution, and in others it is not.

I do not find that this Court, prior to this time, has been called upon, in a case involving the validity of rates fixed for public service corporations by legislative authority, to consider and determine whether the right or opportunity to employ property at a profit is property protected by the XIVth Amendment, nor to note the distinction between "taking property" and enforcing unreasonable rates. Very generally in the cases before this Court, either a loss was shown or a profit so large, as to make it unnecessary to consider the matter. In the few cases in which a profit so small was shown as fairly might call for consideration of the question, the cases were disposed of on other grounds. In some instances, the cases were before the Court for decision not only on the provision of the United States Constitution, but also a provision of the State Constitution or State Statute, which in terms confined the State authorities to prescribing *reasonable* rates, and left the question of their reasonableness to be determined, as fact, by the Court, in case of controversy; and in the con-

sideration of these cases counsel and court merged the question of reasonableness under the State law and the question arising under the United States Constitution and disposed of them as one proposition. For instance—this was the situation in *Reagan v. Trust Co.*, and in *Smythe v. Ames.* All this has led to some confusion, and frequently courts and lawyers have assumed that rates which will not afford a profitable return necessarily are unreasonable, and that if unreasonable they necessarily contravene the XIVth Amendment, but this Court has never so held, nor has it even said that such is the rule, but it has said to the contrary more than once.

In 212 *U. S.*, 19, *Wilcox v. Consolidated Gas Co.*, the necessity of a profit was assumed, and all this Court really held is that a return which would afford a 6% profit on the value was not confiscatory. In 212 *U. S.*, 1, *Knoxville v. Knoxville Water Company*, on the like assumption, the Court declined to say whether a return of 4% net profit would be confiscatory, it not being necessary to determine that in order to dispose of the appeal. In 154 *U. S.*, 362, *Reagan v. Trust Co.*, this Court said—"We do not wish to be understood as laying down as an absolute rule, that in every case a failure to produce some profit to those who have invested their money in the building of a road, is conclusive that the tariff is unjust and unreasonable." In 164 *U. S.*, 578, *Covington & Lexington Turnpike Co. v. Sandford*, this Court said—"It is proper to say that if the answer had not alleged

in substance that the tolls prescribed by the Act of 1890 were wholly inadequate for keeping the road in proper repair and for earning dividends, we could not say that the Act was unconstitutional merely because the Company (as was alleged and as the demurrer admitted) could not earn more than four per cent on its capital stock. * * * The legislature has authority in every case where its power has not been restrained by contract, to proceed upon the ground that the public may not rightfully be required to submit to unreasonable exactions for the use of a public highway established and maintained under legislative authority. If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the Constitution does not require to be remedied by imposing unjust burdens on the public." In 169 *U. S.*, 466, *Smythe v. Ames*, the Court referred to and approved what was said on this point in *Covington & Lexington Turnpike Company v. Sanford.* In 183 *U. S.*, 79 *Cotting v. Godard*, the opinion rendered by this Court, makes it plain that up to that time (according to the understanding of the Court) it had not held that a profitable return would be necessary to avoid the charge of confiscation, and there has been no later decision in this Court holding that profit is necessary to the constitutional validity of legislative made rates. The opinion in a late case 164 *Fed. Rep.*, 648, *M. K. & T. R. R. v. I. C. C.*, in the Circuit from which these appeals come, in which Judges Vandevanter, Hook and Adams sat, says—

"To be just and reasonable within the meaning of the constitutional guaranty, the rates must be prescribed with reasonable regard for the cost to the carrier of the service rendered and for the value of the property therein; but this does not mean that regard is to be had only for the interests of the carrier or that the rates must necessarily be such as to render its business profitable, for reasonable regard must also be had for the value of the service to the public. And where the cost to the carrier is not kept within reasonable limits, or where, for any reason, its business cannot reasonably be so conducted as to render it profitable, the misfortune must fall upon the carrier as would the case if it were engaged in any other line of business." In his opinion in the cases now here on appeal, 184 *Fed. Rep.*, 801, Judge Sanborn apparently concedes the proposition to be true, for he says—"It is, however, beyond the power of a State or its officers to establish or maintain fares and rates the effect of the enforcement of which is equivalent to the taking of the property of public service corporations for public use without compensation, *unless justice to the public requires such confiscation.*"

The Courts—at least this Supreme Court—have gone no further than to declare that the rates must be fair and reasonable to the public and to the railroads, if they can be fair and reasonable to both; but fair and reasonable to the public they must be in any event.

To my mind it seems clear, that so long as a substantial net profit is shown, no question of conflict

with the XIVth Amendment is raised, because in such case no property is taken; that in such case we have simply the question whether the legislature has exceeded the limitation which the nature and purposes of the police power have fixed for the exercise of that power; that consequently these cases are to be determined according to the principles so clearly stated in 123 *U. S.*, 623, *Mugler v. Kansas*, 166 *U. S.*, 269, *Gibson v. U. S.*, 192 *U. S.*, 224, *Bedford v. U. S.*, 200 *U. S.*, 561, *C. B. & Q. R. R. v. Ill.*

But if we should concede that a question under the XIVth Amendment is raised, even then it is not a question of *profit*, but of a fair and reasonable compensation for *the use* of the property or of the service rendered; a question of what is fair and reasonable for the public to pay as well as what is fair to the railroads. It still remains a question of the public welfare and a case of an attempt upon the part of the legislature to provide for the public welfare. Is it not then, even on this concession, an attempted exercise of the police power over a subject within the jurisdiction of the legislature, and in a manner appropriate? And is not the validity of the attempt to be determined as in other cases in which an act in exercise of the police power is called in question in the courts?

Inasmuch as no property would be taken, the question of due process of law is not involved in these appeals. But it will not be out of place to suggest that the right of the State to restrict railroads in the matter of earning profits, while it

leaves other property and businesses unhampered in that regard, depends upon the right to classify railroads by themselves. It is well settled that such classification is valid; and hence the fact that railways are restricted in the acquisition of profits or in the measure of the charges they make, while others are not, does not make a case of want of due process of law.

It is exceedingly difficult, and I think impossible, to see how the qustion of due process of law can arise, or at most have any effect on the result, even if we concede that a question of reasonable compensation is raised under the XIVth Amendment. The fixing of rates is within the jurisdiction of the legislature under its police power. This carries with it jurisdiction (within the limitations placed upon the exercise of the police power by the nature and purposes of the power) to determine what rates the public welfare demands. The legislature in fixing these rates, has followed the approved and legal procedure. It may have exceeded its jurisdiction by fixing rates beyond those authorized to be fixed in the exercise of its police power; but if the rates are invalid it is *solely because the legislature has exceeded its jurisdiction under the police power in an attempt to exercise it, though it followed the proper procedure.* Whether it has in fact exceeded that jurisdiction, must be determined by the rules applicable to the police power, even though the question of due process be in the cases.

It may be suggested that whether rates are reasonable is a judicial question. That may be an-

swered Yes and No. Whether rates are valid is a judicial question. Whether the fixing of rates is reasonable, using the term "reasonable" in the sense of "not arbitrary," is a judicial question, when, as in these cases, they are attacked as being in excess of the jurisdiction of the State under its police power. But, whether they are in fact reasonable in amount, is for the Court only in those cases where they are made under power derived from or limited by Constitutional or Statutory provision which confines the exercise of the power to making rates which shall be reasonable in amount.

From whatever point we view this matter, and along whatever line we pursue the examination of it, we arrive at this result,—i. e. The question is, Have the rate making authorities of Minnesota, in making the rates which are attacked in these suits, exceeded the limitation upon the exercise of the police power which exists because of the nature and purpose of the power? And that question must be determined according to well established principles of law applicable to the police power.

It does not appear that in fixing the Minnesota rates which are in controversy, the State has exceeded the limitation of reasonableness which restricted it in the exercise of the police power, that it has acted arbitrarily, or that the rates might not reasonably have been made in the exercise of an honest judgment.

The Master has not found that the rate making authorities, in making these rates, acted arbitrariy and without reason, nor that in the exercise of an honest judgment they could not reasonably have concluded the rates theretofore in effect were unduly oppressive, and that the general public welfare required them to be adjusted, equalized, and lowered as was attempted to be done. Upon the evidence before the Master, and now before this Court, the Master could not, nor can this Court, make such finding, giving due weight to the presumption and rule of proof, to the benefit and protection of which the State is entitled. Under the accepted rule for measuring the validity of an attempted exercise of the police power, the Act must be held valid unless it clearly appears it could not reasonably have been enacted in the exercise of an honest judgment. The validity of these rates depends upon whether the facts disclosed in evidence and the facts "which everybody knows" (common knowledge) afford ground upon which one might reasonably, in the exercise of an honest judgment, conclude that the public welfare required the making of the rates.

Let us suppose, for sake of argument, that a profit reasonable in amount is necessary to the validity of the rates. Is it then necessary to their validity that the amount shall be such as in the opinion of a Master in Chancery or a Judge of a Court is fair and reasonable? Even on our supposition, is it not a matter of legislative judgment to a greater extent, and is not the court confined to

determining whether the legislative judgment is arbitrary, and without reason? Must the legislative judgment go for naught, and the legislative act be denied validity, simply because a Master in Chancery or a Judge of a Court is of opinion that according to the weight of the evidence produced before him the profit is unreasonably low, when another Master or Judge, considering the same evidence, might honestly come to the conclusion that the profit is reasonably high?——If, in any case, there be a limit below which the State may not force the profit to be had from operating a railroad, is it not a question of public policy as to where the limit shall be placed? and as such to be determined by the legislature, free from interference of the courts solong as it does not appear the legislature has acted arbitrarily and without reason? The legislature fixes the limit of profit which may be made in the business of money lending in Minnesota at 10% a year of the amount of the loan, and forbids the making of a greater profit. No doubt it might fix the limit at 4% a year, and make the taking of greater interest usury, without risk of having its acts nullified or vetoed by the courts. If it can so limit the profit to be earned by the use of money, why may it not so limit the profits to be earned by the use of railroads?

It does not clearly appear that one might not reasonably and in the exercise of an honest judgment conclude that the profits which would be earned under the rates in question would be reasonably high. To the contrary, it appears that one might

well conclude that such profits are fair and reasonable. Of course, when we say profits of 2.79%, 3+% and 2.47% and nothing more, the first impression given is that the profit is low. But when we have stated the percentage of profits, we have told only part of the story. There are other things to be taken into consideration in determining whether the rate making bodies acted arbitrarily and without reason. For example:

(a) It is not unknown that securities bearing interest at rates no higher than 3% a year frequently have sold at a premium.

(b) It is well known that banks pay only 2% or 3% on time deposits, and pay that rate only for even six month periods; also that in some instances in late years trust funds in large amounts have been invested at interest as low as 2% a year.

(c) These percentages of 2.79%, 3+% and 2.47% are figured on the values assigned to the properties by the Master, and the evidence would easily warrant a finding of values much less than those given by the Master—probably one-third less,—which would materially increase the percentages of profit.

(d) These profits are *absolutely net*. The profits of the individual who uses his property in private business ordinarily includes pay for for his own time and services, while in case of the railroads all that which is represented in individual businesses by the time, services and advice of the owner, is paid for as an expense

of the business and deducted before the profits are computed. Not only this expense, but all cost of operation, repair and upkeep are deducted, and a fund for depreciation with which to replace the road and equipment is set aside before the profits are computed or reached.

(e) The railroads in Minnesota are old, well established, and operated in a well settled country, and are not new or experimental, so that there is fair probability the volume of business will not decrease, but, for a long time to come, on the average will be at least as great as now.

(f) These railroads, by virtue of the ownership and operation of the roads and as part of the business of the roads, either directly or through subsidiary corporations owned by them, make large profits which are not included in these percentages of profits. They (N. P. and G. N.) have organized parts of their business as express companies from which they make large profits, none of which is included in these percentages (N. P., Vol. 7, pp. 4251 to 4258. G. N., Vol. 3, pp. 1878 to 1880). They hold their own stocks and bonds in their subsidiary companies, and thus pay to themselves interest and dividends out of their earnings, but the interest and dividends, so paid, are not included in these percentages; and there are many other ways in which they make profits which are not included in these percentages, such as dealing in townsites and

ore lands, (N. P., Vol. 3, pp. 1372, 1373. Vol. 1, pp. 158 to 162). The fact that they have the opportunity because of being engaged in the railroad business to segregate these profits and make them incidental to the railroad business instead of direct, will reasonably justify governmental authority in requiring them to be satisfied with a lower rate of direct profit.

(g) There is nothing in the law, and no compelling common sense reason requiring that the profit shall be measured in percentages of the value of the property, or be based on the value of the property used. The roads are old, well established roads, in a settled country, and long since have paid for themselves out of earnings. With the contested rates in force, the roads would have made returns which would have repaid every cent it cost for operation, maintenance, repair, taxes and to replace depreciation so as to enable the roads perpetually to retain and operate the properties up to present capacity, condition and efficiency, and pay a large profit for every dollar of such cost. The N. P. would have got a net profit of 22.7 cents on each such dollar expended, and the G. N. a net profit of 91.5 cents on each such dollar expended, as well easily appear by taking the cost and profit (as found by the Master and hereinabove set out) and making the computation. Might not this state of facts also reasonably be allowed weight in determining the sufficiency or reasonableness of the profits?

Suppose the legislature should say to a public servant, a railroad—"Your road is an old established one, and has an established business in a well populated country. In the course of the years passed it has drawn from the public for its services enough to operate the road and keep it in good condition and repair, and to repay in dividends and interest an amount equivalent to all the money you have actually put into the road. In the course of your business, and largely because you have been permitted to engage in the particular busines (incidental to it), you have acquired and hold properties and made investments which give you a large return in addition to that which you draw from the public for services rendered to the public. Henceforth so far as returns are to be drawn from the public by way of fares and freight charges are concerned, you must be satisfied with returns sufficient to give back to you the money it shall cost you to maintain and operate the road, pay taxes on it, keep it in repair and replace it as it wears out, or is destroyed, and a substantial profit on every dollar of such cost." Would it be so clearly arbitrary and unreasonable, that a court would be compelled to declare it void as an exercise of the police power? It seems to me not.

The conclusion seems inevitable, that in the Minnesota cases it is not made clear the rate making authorities acted arbitrarily and without reason, nor that reasonably, in the exercise of an honest

judgment they could not have concluded that the rates are fair and reasonable.

There is another feature of these suits, I desire to call to the attention of the Court, for the reasons,—First, that it has an important bearing on propositions discussed in preceding portions of this brief; and Second, that it was such a clear failure of the lower court to give the appellants the benefit of the law as calls for a reversal of the judgments. It is this:

The master, and the circuit judge, in rendering the decisions in these suits, denied the appellants the benefit and protection of the presumption of the validity of the rates in question and the rule requiring their invalidity to be clearly shown, which the law accords them.

That the presumption and rule exist will not be denied. Their existence is so well established, and all so readily admit it, that it is apt not to impress itself upon the mind when the time comes to apply them. I here make some quotations from the decisions of this Court, not to prove the existence of the presumption and rule, but to show that, *in this Court*, they are regarded as meaning something, and as affording the sovereign state a strong defense and protection.

174 *U. S.* 739, *San Diego Land Co. v. National City.*

(P. 754). "That is, judicial interference should never occur unless the case presents, clearly and

beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use."

176 *U. S.* 167, *Chicago, Milwaukee & St. Paul Ry. v. Tompkins.*

(P. 173-174). "In approaching the consideration of a case of this kind, we start with the presumption that the act of the legislature is valid, and upon any company seeking to challenge its validity rests the burden of proving that it infringes the constitutional guarantee of protection to property. The case must be a clear one in behalf of the railroad company or the legislation of the State must be upheld."

186 *U. S.* 238, *Chesapeake & Potomac Tel. Co. v. Manning.*

(P. 245). "But it is well settled that the courts always presume that the legislature acts advisedly and with full knowledge of the situation. Such knowledge can be acquired in other ways than by the formal investigation of a committee, and courts cannot inquire how the legislature obtained its knowledge. They must accept its action as that of a body having full power to act, and only acting when it has acquired sufficient information to justify its action."

203 *U. S.* 261, *Seaboard Air Line v. Florida.*

(P. 270). "In addition it must be borne in mind that it is to be presumed that the railroad commission acted with full knowledge of the situation."

211 *U. S.* 264, *Home Telephone Co. v. Los Angeles.*

(P. 281). "Every presumption should be indulged in favor of the constitutionality of the legis-

lation. In Sweet v. Rechel, 159 U. S. 380, 392, it was said: 'But in determining whether the legislature, in a particular enactment, has passed the limits of its constitutional authority, every reasonable presumption must be indulged in favor of the validity of such enactment. It must be regarded as valid, unless it can be clearly shown to be in conflict with the Constitution. It is a well settled rule of constitutional exposition that if a statute may or may not be, according to circumstances, within the limits of legislative authority, the existence of the circumstances necessary to support it must be presumed.' "

212 *U. S.* 19, *Wilcox, et al. v. Consolidated Gas Co.*

(P. 54). "Upon a careful consideration of the case before us, we are of opinion that the complainant has failed to sustain the burden cast upon it of showing *beyond any just or fair doubt* that the acts of the legislature of the state of New York are in fact confiscatory."

It is common knowledge that two men rarely look at things in the same light. The same fact or state of facts will evidence one thing and call for one conclusion in the mind of one man and different ones in the mind of another man. Let two judges sit and hear the evidence in a case, and it is not surprising to have them disagree as to the facts which the evidence establishes and the law to be applied. It is largely because of this that when an Appellate Court reviews the findings of a trial court, the Appellate Court does not undertake to decide what the facts really are, but only whether on the evidence the trial judge could reasonably arrive at the conclusion he did. The question for the Appellate Court generally is, Can the decision

of the lower court be sustained? Presumptively it is right and he who attacks it must show clearly that it is not. That presumption and rule are given effect, not by taking the independent judgment of the Appellate Court as to what facts the evidence proves, nor by inquiring whether the evidence would reasonably support a different view of the facts, but by inquiring only as to whether the evidence will reasonably support the findings of the trial court.

In these rate suits the trial court is in much the same relation to the state rate making authorities as ordinarily an Appellate Court stands to a trial court. The state legislature and Railroad and Warehouse Commission were tribunals qualified and having jurisdiction to fix rates, and they assumed to do so. The Court has been appealed to to determine whether they exceeded their proper jurisdiction in making the rates. The ultimate question, which the Court is called upon to decide, is whether the state tribunals have exceeded their jurisdiction,—not to decide what rates would be reasonable, nor whether in the opinion of the Court the rates fixed by the State are fair and reasonable. The presumption is that the state tribunals did not exceed their authority, and the party asserting to the contrary must make a clear case. *The Court must look for grounds upon which to sustain the rates, and must find them if fairly it can be done.*

There is only one way in which the State can be given the benefit of this presumption and rule as to burden of proof. That is, by giving the State

the benefit of any finding of fact which can be made on the evidence which will sustain the validity of the rates. The master did not do this. He found the facts independently, and as if the validity of the rates rested solely on his opinion (based on the evidence) of what was the reasonable value of the properties and of what was a reasonable profit for the roads. He showed no concern as to whether reasonably honest, fair and intelligent men might honestly be of opinion on the same evidence that the values were lower, and that a lower rate of profit would be fair and reasonable. He did not consider whether, on the same evidence as before him, another master or judge, or the legislature or Railroad and Warehouse Commission, might not fairly conclude that the values of the roads were less than he thought them, and that 6% or 5%, or even lower, would be a reasonable profit. The Master has applied the wrong rule or theory in making his decision.

In affirming the Master's report, Judge Sanborn answered this proposition by saying in effect, that the presumption the Master's decision is right overrides the presumption in favor of the validity of the legislative act. 184 *Fed. Rep.*, 806-808. But it seems to me his answer is no answer, for it means simply that the presumtion of validity attends the legislative act until the act is attacked in court, and then disappears, which is no presumption at all; and that the rule requiring the invalidity to be shown beyond any fair doubt, is satisfied, if the evidence will sustain findings of fact upon which the in-

validity can be predicated, which is a flat contradiction of the rule. How can the Master's findings be presumed correct and to overcome the presumption in favor of the validity of the rates, when it appears he gave no weight or consideration to the presumption?—Judge Sanborn missed the point of the proposition. The fact that the legislature (if it did do so) fixed the rates without hearing the same witnesses or having the same evidence before it as the master heard and had before him is entirely beside the question. It makes no difference what evidence the legislature had before it, or whether it acted on general information and belief. The question is not "Ought they to have done so," but must their action stand under the established rules of law; and in determining this question it must be assumed the legislature acted with full knowledge. Of course, the court, when the matter comes before it, must decide *the question which is before it for decision,* on the evidence produced in court. But what is the question before the court for decision? It is not whether the rates are in the judgment of the court reasonable and fair; nor yet whether they in fact are reasonable and fair; but it is whether the legislature was reasonable, whether if the evidence before the court had been before the legislature and they had acted on this same evidence in making the rates their act would escape condemnation as violative of the fundamental law.

I do not find that this court has heretofore been called on to say how this presumption and rule as

to the burden of proof are to be enforced so as to give the state the benefit of them. But it has declared their existence and scope, emphatically and unequivocally, in such terms as to make plain that the state must be given the practical protection of the presumption and rule of proof, and not be put off with the mere statement of their existence. I submit that there is no way in which the state can be given the benefit of that presumption and rule, except in the manner I have suggested, i. e., by giving the state the benefit of any finding of facts which will sustain the validity of the rates and which can be supported on the evidence. This is not a mere quibble or piece of theory, but a matter of vital importance to the State of Minnesota in these suits. I think there is no doubt, had the master found the values in the neighborhood (either a little lower or higher) of those given by the state's engineer, Mr. Morgan, and 4, 5 or 6% net a reasonable return, his findings would have been affirmed as against an objection that the evidence would not justify them. If that be so, then the state is entitled to have the validity of the rates determined on the basis of such findings.

I shall not argue the evidence. Undoubtedly counsel for appellants will make a full presentation of the evidence and its possibilities in their briefs, and I intend my argument to supplement theirs, and chiefly to call attention to certain features of the law which I think should be applied to the evidence. I will suggest, however, on the question of value and reasonable return, the evidence shows

that the roads themselves were satisfied with 3% and 4%, returns on railroad properties, and that the investing public was satisfied with 4.09% returns on money invested in railroad stocks (to say nothing of other evidence), and that the state's testimony as to value is credible and shows a disposition to give the roads the benefit of the doubt. The Northern Pacific leased its Manitoba lines for a rental of 3% a year on a low valuation (N. P. Vol. 1, pp. 406, 407). The St. Paul Union Depot dividends were 4% only (N. P. Vol. 1, p. 408). The average dividend on N. P. stock, from 1904 to 1908, did not exceed 7% (N. P. Ex. 18-Gray). The dividend for 1909 as shown on the exhibit would seem to increase it, but the years there referred to are fiscal years, ending in July, and for that reason does not. The average market price of the stock was $170.887 (N. P. Ex. 17-Gray), so that the investing public were satisfied with a return of 4.09% a year on money invested in the common stock of the railroad.

If the Master had found the values at about the figures of Mr. Morgan, including the multiple for right-of-way, (probably lower values even would be sustained), without changing his findings in other respects (leaving out of consideration entirely earnings which should have been, but were not, taken into account by the master, and which would have increased the profits considerably) the result would have been about as follows:

	Total value in Minn.		Inter-state share of Value	% profit
N. P.	$61,099,563.40	(QQ-Morgan) (21%)	$12,830,908.31	4.14+
G. N.	$94,291,280.31	(C-Morgan) (22%)	$20,932,664.22	4.5 +
M. & St. L.	$14,276,188.69	(K-Morgan) (37%)	$ 5,282,189.56	3.8+

I respectfully submit:

FIRST: That the Master and the Circuit Judge have denied to appellants all benefit of the presumption of the validity of the rates, and the rule as to burden of proof, and for that reason the judgments should be reversed.

SECOND: That these rates must be considered as an attempted exercise of the police power, and their validity tested by the rules applicable to the police power, according to which they must be held valid, unless this Court can say that on no fair view or consideration of the evidence and those things which everybody knows and the courts take judicial notice of could a reasonable man honestly conclude that the rates are reasonable. The court cannot fairly say this, and therefore the judgments should be reversed.

EDMUND S. DURMENT.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

No. 599.

SIMPSON, *et al.*,

v.

DAVID C. SHEPARD.

No. 600.

SIMPSON, *et al.*,

v.

EMMA H. KENNEDY, *et al., Extrs., etc., et al.*

No. 601.

SIMPSON, *et al.*,

v.

WILLIAM SHILLABER.

MOTION FOR LEAVE TO FILE BRIEF AND MAKE ORAL ARGUMENT AS AMICI CURIAE.

NEBRASKA STATE RAILWAY COMMISSION,
IOWA BOARD OF RAILROAD COMMISSIONERS,
KANSAS PUBLIC UTILITIES COMMISSION,
SOUTH DAKOTA RAILROAD COMMISSIONERS,
BOARD OF RAILROAD COMMISSIONERS OF NORTH DAKOTA,
CORPORATION COMMISSION OF OKLAHOMA,
MISSOURI RAILROAD AND WAREHOUSE COMMISSION, and the
RAILROAD COMMISSION OF TEXAS.

Now comes Clifford Thorne, H. T. Clarke, Jr., George A. Henshaw, P. W. Dougherty, John Marshall, Grant G. Martin, J. H. Henderson, U. G. Powell, Dwight N. Lewis,

H. R. Oglesby, William D. Williams and W. H. Stutsman, attorneys for:

The Iowa Board of Railroad Commissioners, composed of N. S. Ketchum, D. J. Palmer and Clifford Thorne; the Nebraska State Railway Commission, composed of H. J. Winnett, H. T. Clarke, Jr., and W. J. Furse; the South Dakota Railroad Commissioners, composed of George Rice, F. C. Robinson, and W. G. Smith; the Corporation Commission of Oklahoma, composed of J. E. Love, A. P. Watson, and George A. Henshaw; the Board of Railroad Commissioners of the State of North Dakota, composed of W. H. Stutsman, O. P. N. Anderson, and W. H. Mann; the Kansas Public Utilities Commission, composed of George Plumb, Frank J. Ryan and John T. White; the Missouri Railroad & Warehouse Commission, composed of H. R. Oglesby, Jno. A. Knott and Frank A. Wightman; and the Railroad Commission of Texas, composed of Allison Wayfield, William D. Williams, and John L. Wortham.

The foregoing are defendants in the following cases, as named:

Chicago, M. & St. P. Ry. Co. v. Iowa Board of Railroad Commissioners, *et al.*, now pending on motion for temporary injunction in the U. S. Circuit Court for the Southern District of Iowa; Chicago & N. W. Ry. Co. v. Iowa Board of Railroad Commissioners, *et al.*, now pending on motion for temporary injunction in the U. S. Circuit Court for the Southern District of Iowa; Chicago, B. & Q. R. R. Co. v. Iowa Board of Railroad Commissioners, *et al.*, now pending on motion for temporary injunction in the U. S. Circuit Court for the Southern District of Iowa; Chicago, Great W. R. R. Co. v. Iowa Board of Railroad Commissioners, *et al.*, now pending on motion for temporary injunction in the U. S. Circuit Court for the South-

ern District of Iowa; Chicago, R. I. & P. Ry. Co. v. Iowa Board of R. R. Commissioners, *et al.*, now pending on motion for temporary injunction in the U. S. Circuit Court for the Southern District of Iowa; Chicago, St. P., M. & O. Ry. Co. v. Iowa Board of Railroad Commissioners, *et al.*, now pending on motion for temporary injunction in the U. S. Circuit Court for the Southern District of Iowa; Illinois Central R. R. Co. v. Iowa Board of Railroad Commissioners, *et al.*, now pending on motion for temporary injunction in the U. S. Circuit Court for the Southern District of Iowa; Elizabeth McClintock v. Iowa Board of Railroad Commissioners, Cedar Rapids & Iowa City Ry. & Light Co., *et al.*, now pending on motion for temporary injunction restraining the enforcement of the two-cent fare law, in the U. S. Circuit Court for the Southern District of Iowa; Wm. M. Barrett, as President of the Adams Express Company, v. D. J. Palmer, *et al.*, pending on motion for permanent injunction in the U. S. Circuit Court for the Southern District of Iowa; C. H. Crosby, as vice-president of the U. S. Express Co., v. D. J. Palmer, *et al.*, pending on motion for permanent injunction in the U. S. Circuit Court for the Southern District of Iowa; James Fargo, as president of the American Express Co., v. D. J. Palmer, *et al.*, pending on motion for permanent injunction in the U. S. Circuit Court for the Southern District of Iowa; Wells Fargo & Co. v. D. J. Palmer, *et al.*, pending on motion for permanent injunction in the U. S. Circuit Court for the Southern District of Iowa; the State of Nebraska, and others, v. Chicago, R. I. & P. Ry. Co., Union P. R. R. Co., Chicago, B. & Q. Ry. Co., Missouri Pac. Ry. Co., and Chicago & Northwestern Ry. Co., pending in the U. S. Circuit Court in and for the District of Nebraska, Lincoln Division; the State of Nebraska v. United States Express Co., pending in the Supreme Court of the United States;

St. Louis & San Francisco R. R. Co. v. John A. Knott, *et al.*, The Atchison, T. & S. F. Ry. Co. v. John A. Knott, *et al.*, The St. Louis Southwestern Ry. Co. v. John A. Knott, *et al.*, The Chicago, R. I. & P. Ry. Co. v. John A. Knott, *et al.*, The St. Louis, K. C. & C. Ry. Co. v. John A. Knott, *et al.*, The St. Joseph & G. I. Ry. Co. v. John A. Knott, *et al.*, Kansas C. C. & S. Ry. Co. v. John A. Knott, *et al.*, Chicago G. W. Ry. Co. v. John A. Knott, *et al.*, Chicago, M. & St. P. Ry. Co. v. John A. Knott, *et al.*; The Chicago & A. Ry. Co. v. John A. Knott, *et al.*; Kansas C. S. Ry. Co., v. John A. Knott, *et al.*, St. L. & H. Ry. Co. v. John A. Knott, *et al.*, Mo. Pac. Ry. Co. v. John A. Knott, *et al.*, St. L. I. M. & So. Ry. Co. v. John A. Knott, *et al.*, Mo. K. & T. Ry. Co. v. John A. Knott, *et al.*, Chicago B. & Q. Ry. Co. v. John A. Knott, *et al.*, Quincy, O. & K. C. R. R. Co. v. John A. Knott, *et al.*, Wabash R. R. Co. v. John A. Knott, *et al.*, said cases now pending in the Supreme Court of the United States; Missouri, K. & T. Ry. Co. v. J. E. Love, *et al.*, pending in the Supreme Court of the United States on a writ of error to the Circuit Court of Appeals of the Eighth Circuit; Atchison, T. & S. F. Ry. Co. v. J. E. Love, *et al.*, pending in the Supreme Court of the United States on a writ of error to the Circuit Court of Appeals of the Eighth Circuit; Gulf C. & S. F. Ry. Co. v. J. E. Love, *et al.*, pending in the Supreme Court of the United States on a writ of error to the Circuit Court of Appeals of the Eighth Circuit; Midland Valley Railroad Co. v. J. E. Love, *et al.*, pending in the Supreme Court of the United States on a writ of error to the Circuit Cout of Appeals of the Eighth Circuit; Kansas C. Southern Ry. Co. v. J. E. Love, *et al.*, pending in the Supreme Court of the United States on a writ of error to the Circuit Court of the Eighth Circuit; Kansas C. Southern Ry. Co. v. J. E. Love, *et al.*, in the

Western District of Oklahoma, now pending on an application for a temporary injunction enjoining the two-cent passenger law of Oklahoma, and certain freight orders of the Corporation Commission; Union Pacific R. R. Co. v. G. W. Kanavel, *et al.;* Topeka & N. W. R. R. Co. v G. W Kanavel, *et al.,* Leavenworth K. & W. Ry. Co. v. Kanavel, *et al.;* Kansas City, M. & O. Ry. Co. v. Kanavel, *et al.;* St. Joseph & G. I. Ry. Co. v. Kanavel, *et al.;* Missouri Pacific Ry. Co. v. Kanavel, *et al.;* Chicago, B. & Q. R. R. Co. v. Kanavel, *et al.;* Missouri K. & T. Ry. Co. v. Kanavel, *et al.;* Chicago, R. I. & P. Ry. Co. v. Kanavel, *et al.;* St. Louis & S. F. R. R. Co. v. Kanavel, *et al.;* Kansas Southwestern Ry. Co. v. Kanavel, *et al.;* Atchison, T. & S. F. Ry. Co. v. Kanavel, *et al.;* and The Leavenworth & Topeka Ry. Co. v. Kanavel, *et al.;* the foregoing cases wherein G. W. Kanavel, *et al.,* are defendants, now pending in the U. S. Circuit Court for the District of Kansas; the following cases pending in the Circuit Court of the United States for the Southern Division of the District of South Dakota: Chicago & N. W. Ry. Co. v. Board of Railroad Commissioners, *et al.;* Chicago, M. & St. P. Ry. Co. v. Board of Railroad Commissioners, *et al.;* Chicago, B. & Q. R. R. Co. v. Board of Railroad Commissioners, *et al.;* Minneapolis & St. L. R. R. Co. v. Board of Railroad Commissioners, *et al.;* Chicago, St. P. M. & O. Ry. Co. v. Board of Railroad Commissioners, *et al.;* Chicago, M. & P. S. Ry. Co. v. Board of Railroad Commissioners, *et al.;* P. & Ft. P. B. Ry. Co. v. Board of Railroad Commissioners, *et al.;* Chicago, R. I. & P. Ry. Co. v. Board of Railroad Commissioners, *et al.;* said So. Dak. cases were commenced October 3, 1907, to enjoin the enforcement of an order of the Board of Railroad Commissioners putting into effect a two and one-half cent passenger rate. Subsequently, the

legislature passed a two-cent passenger rate law, and original bills in the nature of supplemental bills were filed in the following cases: Harold C. Smith v. Chicago, N. W. Ry. Co. and Board of Railroad Commissioners, *et al.;* Delia Robbins v. Chicago, M. & P. S. Ry. Co. and Board of Railroad Commissioners, *et al.;* Marvin Hewitt v. P. & Ft. P. B. Ry. Co. and Board of Railroad Commissioners, *et al.;* Marvin Hewitt and Chicago & N. W. Ry. Co. v. P. R. C. & N. W. Ry. Co. and Board of Railroad Commissioners, *et al.;* Minneapolis & St. L. R. R. Co. v. Board of Railroad Commissioners, *et al.;* Chicago, St. P. M. & O. Ry. Co. v. Board of Railroad Commissioners, *et al.;* Chicago, M. & P. S. Ry. Co. v. Board of Railroad Commissioners, *et al.;* Chicago, B. & Q. R. R. Co. v. Board of Railroad Commissioners, *et al.;* Chicago, R. I. & P. Ry. Co. v. Board of Railroad Commissioners, *et al.* Master's report showing a return of 3.94% on 2-cent rate, and 6% on 2½-cent rate, now ready for confirmation. On February 1, 1911, the Board of Railroad Commissioners of South Dakota made an order putting into effect reduced intrastate freight rates to become effective on the 15th of March. On the 10th of March, bills in equity were filed in the U. S. Circuit Court for the Southern Division of the District of South Dakota to enjoin the enforcement of provisions of said order and the rates therein prescribed in the following cases: Chicago & N. W. Ry. Co. v. Board of Railroad Commissioners, *et al.;* P. & Ft. P. B. Ry. Co. v. Board of Railroad Commissioners, *et al.;* P. R. C. & N. W. Ry. Co. v. Board of Railroad Commissioners, *et al.;* Chicago, M. & St. P. R. R. Co. v. Board of Railroad Commissioners, *et al.;* Chicago, M. & P. S. R. R. Co. v. Board of Railroad Commissioners, *et al.* On May 2, 1911, the Board of Railroad Commissioners of South Dakota issued an express distance tariff to become effective on

May 16th, and on the 13th of May bills in equity were filed in the U. S. Circuit Court for the Southern Division of the District of South Dakota for the purpose of enjoining the enforcement of said order and the rates therein prescribed in the following cases: Wells Fargo & Co. v. Board of Railroad Commissioners, *et al.;* W. M. Barrett, as President of the American Express Co. v. Board of Railroad Commissioners, *et al.;* James C. Fargo, as President of the Adams Express Co. v. Board of Railroad Commissioners, *et al.;* and Great N. Express Co. v. Board of Railroad Commissioners, *et al.*

The said parties respectfully ask leave, as *amici curiae,* to file a brief and make an oral argument herein attacking the positions taken by the appellees relative to the construction and application of Section 8, Article 1, of the Constitution of the United States, providing that "The Congress shall have power—To regulate commerce with foreign countries and among the several States and with the Indian tribes"; also in opposition to certain positions taken by both appellants and appellees upon the construction and application of the fifth and fourteenth Amendments to the Constitution of the United States providing that:

> "No person shall be * * * deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation; * * *
>
> "Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Said provisions of the Constitution of the United States are invoked by appellees to enjoin the orders of the Minnesota Railroad & Warehouse Commission and certain statutes of the State of Minnesota relative to charges for the transportation of passengers and freight between points in Minnesota.

CLIFFORD THORNE.
H. T. CLARKE, JR.
GEO. A. HENSHAW.
P. W. DOUGHERTY.
JOHN MARSHALL.
J. H. HENDERSON.
GRANT G. MARTIN.
U. G. POWELL.
DWIGHT N. LEWIS.
H. R. OGLESBY.
WILLIAM D. WILLIAMS.
W. H. STUTSMAN.

In support of this motion your petitioners respectfully allege that they represent large interests in cases now pending in the Federal courts, including both District, Circuit and Supreme Courts, and that the decisions in said cases will be practically determined by the decision of the Supreme Court in the above entitled cases.

Because up to this time the Court has not established the basic principles governing the proper methods for the apportionment of expenses, earnings, and value between intrastate and interstate business, and because practically all these fundamental questions are directly involved in these cases, and for the further reason that the rules in regard to the same will control the result in seventy-seven cases now pending wherein your petitioners are parties defendant, we therefore ask that we be permitted to be heard on said questions at this time.

Your petitioners further allege that the record in the cases at bar is deficient, lacking basic evidence upon expenses and upon value which is necessary to be a part of the record before substantial justice can be done and the issues involved in the said cases determined; and that the railway companies are able to furnish the said information.

The Court must readily recognize the similarity of the many questions involved in these Minnesota rate cases and in those wherein your petitioners are parties; and how completely the decision of the Court in these cases will necessarily affect the conclusions and decisions in those cases of your petitioners.

If this court should hold that the establishment of maximum rates on passengers and freight by the Minnesota Railroad and Warehouse Commission, as alleged and proved in the cases at bar, constitute such an interference with interstate commerce as to make the orders of the State Commission unconstitutional, the same conclusion will probably

be reached in all of the cases wherein your petitioners are parties, and will deter the future exercise of those functions now placed upon your said petitioners by statutes in the various states represented by them.

If this court should hold in the above entitled cases that the manner of determining extra cost for the conduct of intrastate business and that the application of the multiple of extra cost is correct, it will materially affect all the cases of your said petitioners and will in effect predetermine all said cases adversely to these petitioners.

If this court should hold in the above entitled cases that the revenue basis is the correct basis for the division of expenses between interstate and intrastate business, and between passenger and freight business, it will materially affect in a most substantial and far-reaching manner all of the cases of your said petitioners, and will determine the result of said cases adversely to these petitioners.

If this court should hold that the revenue basis is the correct one for the division of valuation of properties devoted to state and interstate business, the same will affect in a most vital and important manner all the said cases of your petitioners, and will probably conclude and determine all of the said cases adversely to your petitioners.

If this court should hold that reproduction cost, *new*, of railway properties is the same as fair value, and that no allowance shall be made for depreciation, but that said depreciation is offset by solidification and adaptation of the roadbed, the same will probably defeat your petitioners in their said cases.

If this court should hold with the representatives of the carriers in these cases, and not contested by the defendants, that the mile pro rate basis is the correct basis for the determination of that portion of the property lo-

cated in such state used by the interstate business, and thereby made the basis for division in value between state and interstate business, your petitioners represent to this court that the same will probably defeat your petitioners in their cases described above.

If this court should hold that the value of the right of way owned by the railroad companies entitled to a return is to be ascertained by taking three times the market value of surrounding land, your petitioners represent and show to this court that the same will most seriously affect every one of the above described cases of your petitioners and will probably cause the defeat of said petitioners.

If this court should hold with Judge Sanborn that 7% above all taxes, above all operating expenses, maintenance and depreciation, is the minimum rate of return below which comes confiscation of such properties as are involved herein under the circumstances surrounding them, your petitioners allege that the same will most seriously embarrass them in the further prosecution of their cases, and the same is one of the controlling factors which will determine the decisions in all the said cases. We disagree with the position taken by both appellees and appellants in the lower Court upon this subject of reasonable rate of return.

Because of the character of the litigation, which involves issues the decisions upon which may be fatal to your petitioners' cases; because of the vast interests involved affecting other commonwealths as well as that of Minnesota, we, the representatives of the railway commissions of said states, respectfully pray that we shall be granted a hearing as *amici curiae* upon the construction of the said portions of the constitution and the application of the same to the facts involved.

Therefore, the undersigned respectfully ask leave of court to file a brief and make an oral argument herein as *amici curiae*.

Respectfully submitted,

CLIFFORD THORNE,
H. T. CLARKE, JR.,
GEO. A. HENSHAW,
P. W. DOUGHERTY,
JOHN MARSHALL,
GRANT G. MARTIN,
U. G. POWELL,
J. H. HENDERSON,
DWIGHT N. LEWIS,
H. R. OGLESBY,
WILLIAM D. WILLIAMS,
W. H. STUTSMAN.

[redacted]

Supreme Court of the United States

OCTOBER TERM, 1911.

SIMPSON, *et al.*
v. No. 599
DAVID C. SHEPARD
SIMPSON, *et al.*
v. No. 600
EMMA H. KENNEDY, *et al, Extrs., etc., et al.*
SIMPSON, *et al.*
v. No. 601
WILLIAM SHILLABER

BRIEF AND ARGUMENT

on behalf of the

NEBRASKA STATE RAILWAY COMMISSION,
IOWA BOARD OF RAILROAD COMMISSIONERS,
KANSAS PUBLIC UTILITIES COMMISSION,
SOUTH DAKOTA RAILROAD COMMISSIONERS,
BOARD OF RAILROAD COMMISSIONERS OF NORTH DAKOTA,
CORPORATION COMMISSION OF OKLAHOMA,
MISSOURI RAILROAD AND WAREHOUSE COMMISSION,
RAILROAD COMMISSION OF TEXAS,

As *Amici Curiae.*

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State Tax on Ry. Gross Receipts, 15 Wall. 284, **47.**

St. Louis, S. W. Ry. v. Allen et al, 187 Fed. 290, **52.**

St. Louis, etc., v. Hadley, 168 Fed. 317, **52, 56.**

St. Louis & San Fran. R. Co. v. Gill, 156 U. S. 649, **161.**

Steenerson v. Gt. Nor. Ry. Co., 69 Minn. 353, **276.**

Stone v. Farmer's Loan & Trust Co., 116 U. S. 307, **49, 146, 151, 152, 153, 156, 159.**

Stone v. Railroad Co., 62 Miss. 607,* **147.**

Stone v. Wisconsin, 94 U. S. 181, **146, 147, 162.**

Telephone Co. v. State, 118 Ind. 194,* **147.**

Tilley v. Savannah F. & W. R. Co., 5 Fed. 641, **162.**

Texas, etc., Ry. v. Abilene Cotton Oil Co., 204 U. S. 426, **39, 42, 182.**

Texas & Pac. Ry. v. I. C. C., 162 U. S. 197, **141, 179.**

Texas & Pac. Ry. v. R. R. Comm. of La., 183 Fed. 1005, **32.**

The Daniel Ball, 10 Wall. 557, **43.**

The Winnebago, 205 U. S. 354, **47.**

Twp. of Burl. v. Beasely, 94 U. S. 310*, **147.**

Trade-Mark Cases, 100 U. S. 82, **27, 28.**

Wabash, etc., R. Co. v. Ill., 118 U. S. 557, **30, 31, 32, 34, 147.**

Weemes Steamboat Co. v. People's Co., 214 U. S. 345,* **147.**

Wells Fargo Co. v. D. J. Palmer, et al (not yet reported), **52.**

West. v. Rawson, 40 W. Va. 480, **162.**

Western Advanced Rate Case, 20 I. C. C. Rep 307. See Advanced Rate Cases.

Western Union Tel. Co. v. Pendleton, 95 Ind. 12,* **147.**

Willcox et al v. The Cons. Gas Co., 212 U. S. 19, **168, 264, 274, 277, 284, 336, 340, 341, 343.**

Winchester & L. Turnpike Road Co. v. Croxton, 98 Ky. 739, **162.**

Winona, etc., v. Blake et al, 94 U. S. 180, **146, 147, 161, 162.**

Woodside v. Tonopah, etc., 184 Fed. 358, **52, 56.**

Zanesville v. Gas Light Co., 47 Ohio St. 1,* **147.**

*Cases marked with star are only referred to in brief as citing Munn v. Illinois.

Resolution Adopted by

THE NATIONAL ASSOCIATION OF RAILWAY COMMISSIONERS

at Washington, D. C., October 12, 1911.

Be it Resolved by the National Association of Railway Commissioners in Convention assembled: That its hearty endorsement is given to the action of the railroad commissions of the eight Mid-Western states in preparing and filing a brief as *amici curiae* in the Minnesota Rate Cases in the Supreme Court of the United States, and the representatives of the said states are hereby requested to embody this resolution in their said brief.

PRELIMINARY STATEMENT.

Two underlying basic problems are presented in these cases; they involve:

The autonomy of the States; and

The relative functions of Courts and Commissions in the regulation of common carriers.

The State Commissions, joining in this brief and argument, are profoundly concerned in the possible rulings of the Supreme Court upon the fundamental issues presented in this record. The conclusions of the Court upon these questions will control the outcome in seventy-seven cases, brought within the past few months in the Federal Courts, which present precisely the same issues, and wherein the said Commissions are parties defendant. Of the cases now pending before this Court, we have selected the Minnesota Rate Cases as best presenting these various propositions.

We are not primarily interested in the success or failure of the Minnesota Railroad & Warehouse Commission in this litigation; with her eminent and learned counsel, Minnesota is abundantly capable of taking care of her own interests. But we are most vitally concerned in several of the basic doctrines announced by the lower court; and it will be the soundness of a few of those principles which will receive our chief consideration.

We believe this record is entirely deficient in having evidence upon certain facts, which it is absolutely necessary to know before it is possible to determine the issues involved. These facts are in the possession of, and should have been furnished by, the railway companies.

We believe Judge Sanborn's decision is based upon many radically wrong, unjust and wholly unreasonable principles of fact and law.

And lastly, we believe were it possible for this Court to sustain certain doctrines announced by Judge Sanborn, the is-

sues in the cases now pending in the Federal Courts, wherein the said Commissions are parties defendant, will be determined adverse to the said Commissions.

There are many intricate, complicated problems of accounting methods involved in a case of this character. And the success or failure of the States in this class of cases will depend upon what rules of accounting are adopted. We find both courts and commissions in confusion as to what are the correct basic rules. One distinguished engineer has stated on the witness stand that two experts undertaking the valuation of the same property, with precisely the same motive, but adopting different rules, would arrive at conclusions varying from 25 per cent to 30 per cent. The truth of this statement is abundantly demonstrated by the record in these cases. This variation is accentuated many times when the experts are testifying for opposing interests.

If the value of the property apportioned to state traffic is placed too high, or the expenses charged to state traffic are too large, or the earnings too low, or the rate of return allowed is too high, the result of any of these four contingencies will be equally unjust. Placing the required rate of return 25 per cent too high will have precisely the same effect as estimating the expenses 25 per cent higher than they should be. Each factor is of equal importance. Equal care and consideration must be given to each subject. A variation of 1½ per cent in the rate of return is difficult to analyze closely, and yet it is of significance equal to a variation of over twenty-five million dollars in the valuation of the Great Northern property in Minnesota. The actual facts should be just as diligently sought for and studied in the one case as in the other.

Questions of fact may be repeated in case after case over a long period of years, until certain predominating features by their frequent recurrence, demanding some uniformity in their interpretation, gradually ripen into questions of law. This is peculiarly true of these questions regarding the proper methods of making valuations, and apportioning expenses, revenues, and values, between state and interstate business. At the present time there are many cases pending in the lower

federal courts, which present precisely the same issues as those which are raised in these Minnesota rate cases. Every one of these cases can easily require just as extensive a record as that presented to this Court in the Consolidated Gas Case, the Knoxville Water Case, or any of these three Minnesota Rate Cases. In this litigation, the transformation of questions of fact into principles of law is already rapidly in progress. We find, for instance, that a District Judge of South Dakota adopts the revenue basis for the division of value between state and interstate business, not because it is founded upon sound reason, for he *specifically refuses to consider the reason,* but because he feels bound by the adjudications on the same issue presented to and decided by Judge Sanborn of Minnesota, and other federal courts during the past few months. The question as to what is a reasonable rate of return is also rapidly ripening into a question of law. We find the judges quoting other courts, and contesting parties relying upon various decisions of the Supreme, Circuit, and District courts, as well as of the Interstate Commerce Commission, to determine what is a reasonable rate of return. During this period when these legal principles are in the formative stage and are gradually crystallizing, it is of supreme importance that all phases of these problems should receive careful consideration.

There is one great function the Federal Government can perform which will tend to bring about harmony and uniformity. This Court can determine what are the correct methods and principles to guide the investigations by the commissions. While this Court may properly refuse to make an accounting in every case coming up to it from all the different states over the nation, it can examine the record in these cases sufficiently to find out if proper methods were pursued by such tribunals. The fundamental questions can readily be divided under four heads: the proper basis for the apportionment of expenses between state and interstate business; the proper basis for the apportionment of value between state and interstate business; what are the proper methods for the determination of a rea-

sonable rate of return; and what are the different elements to be included in fair value.

Today many of these seem to be questions of fact, but they are gradually ripening into questions of law. When the determination of what method shall be adopted, the use, the ton or passenger mile, the train mile, the revenue, or the cost of service, in order to apportion value between state business and interstate business, effects differences amounting to fifty million dollars chargeable to a state, upon which a return must be paid every year, you have a problem worthy of long and careful consideration by our highest court. This same problem appears over and over again in all these cases, and will continue to appear for generations to come. It is of more importance that these problems should be solved correctly than that they should all be solved this year or next year. When they are once determined, the present confusion will rapidly tend to subside.

This record presents the issues relative to the above matters as clearly, perhaps, as any record has done in the past, or as any will do in the near future.

At this time, in order to prevent any misapprehension as to the real matters at issue, it may be well to examine, briefly, precisely what effect the orders involved had upon the revenues of the companies as distinguished from their rates. The latter may be mere paper rates upon which traffic does not move, and a statement as to a reduction in rates may give an entirely false impression as to the actual reduction in revenue. Again, the vast bulk of all the rates in effect may be far below the old or the new maximum rates, the latter causing a reduction at exceptional points where the rates were exorbitantly high. This court is primarily concerned under the constitution, with the effect of the said orders upon the revenues of the carriers.

The orders of the Minnesota Commission, and enactments of the legislature, involved in these cases, reduced maximum rates on freight and passengers at a large number of points in the state. The Interstate Commerce Commission has often made reductions of 50 per cent in maximum rates between certain points which simply tended to remove inequalities, and

had but a small effect upon the revenues of the carriers. Likewise in these cases, the net reduction in actual revenues effected by the Commission's orders was small. The record shows the following reductions:

Reductions Effected.

"In—Rates to Distributing Centers."

M. & St. L.: Nothing was claimed on account of this order on the M. & St. L.

Northern Pacific: Record does not show amount of reduction in revenue. The small number of towns concerned and few rates would make the amount nominal.

Great Northern: This was the only company producing statistics showing actual amount of reduction in revenue because of these rates. While the rates effected were reduced 20 per cent, yet the amount of reduction was only $766.74 out of a total intra-state revenue of $4,494,698.11, (Great Northern Record Exhibit Parker 22,) *or less than one-sixtieth of one per cent.* This can only be classed as a readjustment of interior rates so as to remove unjust relationship or discrimination, existing prior thereto.

Commodity Rates

Those restrained by temporary injunction, and never in effect:

Northern Pacific: $21,493.67 (estimated Johnson Exhibit 63, Nor. Pac. Rec. Vol. 1, p. 264) out of a total intra-state revenue of $2,813,104.35, *or less than eight tenths of one per cent.* (Data for other roads substantially similar.)

Class Rates on Merchandise.

Northern Pacific: $97,719.78 for period of one year, or 3.4 per cent of intra-state revenue ($2,813,104.35—Nor. Pac. Rec. Vol. 1, p. 259.) This is not actual reduction in revenue for it assumes old rates and an increased business at one and the same time. This is not such a glaring absurdity as in the case of passenger business, but the fundamental error is the same in each case.

Passenger Rates.

Northern Pacific: $8,242.93, (Nor. Pac. Rec. Vol. 10, Johnson table 58), which is 1.1 per cent of passenger intra-state revenue for test period of nine months, or one-third of 1 per cent of entire intra-state earnings. (This is only table showing actual results on Northern Pacific. Others estimate loss assuming old rates in effect, and also increased business which was

due to the lower rates, an assumption which is absurd upon its face.)

The above figure is arrived at by comparison of the gross earnings for similar periods under the new rates and the old. Low rates cause increased traffic, especially in passenger business, therefore a comparison of actual earnings with those which would have been under the old rates, is unfair and unjust because the increased passenger business would not have existed to that extent under the old rates. The figure given is especially significant in view of the fact that the mileage of revenue passenger trains for the fiscal year ending June 30, 1908, including the test period under the new rates, was more than three thousand less than during the preceding fiscal year when the rates were not in effect; (page 95 A and 61 A of Annual Report to Commission, Nor. Pac. Rec. Vol. 1), in other words, the cost of the service was substantially the same during both periods.

Average Revenues.

The freight revenue, under the rates which were put in effect, from Minnesota intra-state business, exceeded the same item on interstate traffic per ton mile more than 100 per cent on the Great Northern, and over 40 per cent on the Northern Pacific. (Nor. Pac. Rec. Vol. 1, p. 262, 267, Ex. Elliott 80.)

Under the statutory passenger rates the average revenue per passenger mile on the Northern Pacific was 1.9404 cents as compared to 1.9228 cents on the interstate business. On the Great Northern the average revenue per passenger mile on the intra-state business was 1.9016 cents, and on the interstate business 2.0469 cents. (Nor. Pac. Rec. Vol. 1, pp. 262, 268.)

The action of Minnesota relative to passenger rates was largely making them uniform, substituting a straight 2 cent fare for the prior 2 cent mileage books, passes, half fare permits, etc. The Federal Government removed the minimum charges abolishing special rates, passes, etc., but it did not reduce the maximum charges. The State performed both tasks, thereby bringing about greater uniformity.

The record in this case includes the printed testimony, and among other things, the annual reports of the companies to their stockholders, by reason of the stipulation of parties to that effect. In addition to this, the Court should take judicial notice of all the tariffs filed, according to law, with the Interstate Commerce Commission, by virtue of the fact that they become in a sense, a part of the law of the land, the statute specifically stating that the rates shown in the tariffs so filed shall be the lawful rates for all carriers. This point was first made, to our knowledge, by the railway companies in a recent western case, and we believe it to be sound and wise for many reasons unnecessary to state at this time. Further the court may take judicial notice of rates of return on investments (which of course includes market quotations on stocks and bonds). This was claimed by the carriers before the lower court, and not opposed by the State; it has been suggested in former decisions, and it will be discussed later in the brief. If the court cannot take judicial notice of such facts then there is nothing before this court in this case upon which to determine what is a reasonable rate of return.

The court considers the real party in interest in any controversy according to well recognized canons of the law. In the cases at bar, notwithstanding names used, the bare facts of the large expenditures incurred by the carriers in the litigation, the attitude of all witnesses and the nature of their employment, frankly conceded at all times, entirely justifies the consideration of the railway companies themselves as the complaining parties, upon whose shoulders is cast the burden of the controversy. Otherwise, by the simple substitution of other nominal complainants for the actual parties, and making the latter defendants, all the ordinary, well recognized rules controlling the production of the necessary evidence to support the claims would be completely distorted; we would have one defendant fighting the other, and the burden of the production of the necessary evidence in the possession of the railway company, one of the defendants, removed. For these reasons the railroad companies must be considered as having

the ordinary duties, responsibilities, and burden of the complaining parties.

On September 6, 1906, the Minnesota Railroad & Warehouse Commission issued an order reducing the maximum rates on general merchandise within the state; and on May 3, 1907, a supplemental order made a reduction on "in-rates to distributing points." April 4, 1907, the Minnesota State Legislature passed an act reducing the maximum passenger fare to two cents a mile; and on April 18, 1907, the legislature reduced maximum commodity rates on grain, lumber, coal and live stock, and other commodities. Injunction proceedings were brought by the stockholders of these companies restraining the enforcement of the orders. Hon. Charles E. Otis was appointed Special Master; he decided practically all points in favor of the railway companies. Hon. W. H. Sanborn, Circuit Judge, on April 8, 1911, rendered a decision in the cases based upon the findings of the Special Master in all particulars. The two grounds for the injunction were as follows:

(1) That the orders of the Commission and the acts of the legislature, described, substantially burdened and regulated interstate commerce on the railroads of these companies; and

(2) That their necessary effect was the confiscation of the property of the companies.

These cases are now pending on appeal to this Court made by the Minnesota Railroad and Warehouse Commission. Other representative State Commissions in the same locality, having cases in the federal courts presenting identically the same issues, file this brief and argument as *amici curiae*. The National Association of Railway Commissioners, instead of filing a separate brief, gave formal approval of the action of the said states, and requested that the resolution to that effect, which was passed by them, should be printed in this brief; it will be found on page two.

A statement of facts in detail has been clearly and concisely made by other counsel, and we will make no further statement at this time.

The propositions we will discuss in this brief and argument are as follows:

1. The orders of the Minnesota authorities, at issue in this case, do not constitute a direct burden upon interstate commerce, in violation of the Constitution.

2. Where a conflict in opinion as to facts, not as to some fundamental legal proposition, exists between the legislative tribunal and the lower Court, the conclusion of the legislative tribunal should control, providing the Court finds it possible that a fair minded person might have reached the same conclusion.

The lower Court's decision, and the Master's findings, should have been directed to flagrant errors in the rules or methods followed by the Minnesota Commission and legislature as to fundamental matters; if none such exist, then the conclusions of the said tribunals must stand. Upon the other hand, if such erroneous methods of investigation were pursued, or fundamentally wrong legal principles were adopted by the said tribunals, that they failed to consider facts which should have been considered, or reached conclusions which a fair minded person could not have arrived at, then the decisions of the lower Court should be reversed, and the cases should be referred back with orders of court as to the correct legal methods and principles to be followed. Only in this way can the proper functions of courts and legislative tribunals be preserved.

3. The record is deficient in that it fails to give the facts necessary to determine actual expenses, but leaves the said item to a mere guess, based upon conjecture and unsound opinion evidence.

4. The evidence in this record is entirely insufficient to furnish any basis whatsoever for the determination of what is a reasonable rate of return upon the value of the properties involved.

5. The record is deficient in that it fails to show the value of that portion of the property actually used in the conduct of intra-state business, but the lower Court and the Master attempt to guess at this figure on the *revenue basis*, a basis which is absurd in reason and has been specifically repudiated by this Court.

6. The apportionment of values upon the expense basis, as made by Special Master Otis, but not adopted by Judge Sanborn, is unreasonable and unjust.

7. The lower Court erred by including in the value entitled to a return, many factors which should have been excluded.

8. The lower Court made a fatal error in taking cost of reproduction *new*, without allowing for depreciation, as the basis for his calculations.

9. The Minneapolis & St. Louis Railroad Company cannot be accepted as the standard for the determination of the issues involved in these cases.

We will not consider the adequacy of the complaints, nor the interpretation of the particular Minnesota statutes relative to appeals to the commission for advances before the courts have jurisdiction, which would seem in harmony with the decisions of this Court relative to appeals to the Interstate Commerce Commission for relief from unreasonable rates prior to any action in court.

Many questions are raised in this record which we would like to have covered, but we have confined our discussion to the different phases of a few of the most fundamental propositions, which in our judgment will, when carefully considered, compel a reversal of the decision of the lower Court.

ARGUMENT.

PART I.

THE ORDERS OF THE MINNESOTA AUTHORITIES, AT ISSUE IN THESE CASES, DO NOT CAUSE A DIRECT BURDEN UPON INTERSTATE COMMERCE, IN VIOLATION OF THE CONSTITUTION.

This is true, according to the decisions of this Court, and according to reason.

Judge Sanborn says: "The reduction of local rates does not interfere with interstate rates 'as a matter of law,' yet it may do so as a matter of fact." (Nor. Pac. Record, Vol. 1, P. 412.)

There appears to be an element of sophistry in this statement. However that may be, we will discuss the subject under two general heads, as follows: Section 1. Interference with interstate commerce as a matter of law; and, Section 2. Interference with interstate commerce as a matter of fact.

Section 1. Interference with Interstate Commerce as a Matter of Law.

The careful analysis and classification of the former decisions of this Court bearing upon these issues before us is an important duty cast upon those representing large interests in this proceeding; but there is still another duty more important, perhaps, than that. The reason of the law is of equal importance with the letter of the law. In this class of cases where some confusion exists between the decisions of different Federal Courts as to just what is the law, there are those who will claim it is in the formative stage. At such a time questions of public policy are forced into discussion, and a two fold task is cast upon us: We must consider, first, the

trend of former adjudications upon similar issues; and, second, whether those decisions are based upon sound doctrine.

THE ORDERS IN ISSUE.

The Minnesota Legislature and Commission, in their orders now under investigation, (paraphrasing the language of Chief Justice Fuller in *Lehigh V. R. v. Penn.*, 145 U. S. 192, 204) do not attempt to fix maximum rates upon transportation from points in foreign states to other points in foreign states not touching Minnesota; nor upon transportation by continuous carriage from points in a foreign state passing through Minnesota and ending in a third state; nor upon transportation by continuous carriage from points in Minnesota to points in other states; nor upon transportation by continuous carriage from points in other states to points in Minnesota; nor upon transportation by continuous carriage from points in another state to other points in the same state passing through Minnesota; nor upon transportation by continuous carriage from points in Minnesota to other points therein, however passing out of Minnesota into another state and back again in the course of transportation; but only in respect to transportation from points in Minnesota to other points in Minnesota without passing out of the state.

The Minnesota authorities do not attempt to fix intrastate rates according to any rule or standard of interstate rates; nor do the orders of the said Minnesota authorities interfere with the carriage of interstate traffic, with the movement or handling thereof; nor do the said authorities attempt to control in any manner whatsoever any of the instrumentalities of interstate commerce.

There is no conflict between the parties as to any of the foregoing propositions, nor is there any claim made by Judge Sanborn, or Special Master Otis, in any way affecting the accuracy of any of the foregoing statements.

THE SANBORN DOCTRINE.

Just what is "the Sanborn Doctrine"? That is the first question which concerns us.

Any reduction of a state rate which may affect a competitor in the same business outside of the state unless an interstate rate is reduced, or which a shipper or passenger may, through the exigencies of the business, make use of on a portion of an interstate haul, is an interference with interstate commerce; that, in substance, is the gist of the Sanborn Doctrine.

Under the next heading—Effect of the Sanborn Doctrine—we will discuss the inevitable and violent changes that must follow the adoption of this principle.

Judge Sanborn gives a large number of concrete examples illustrating several phases of the foregoing principle; he holds: first, that each one of these examples constitutes a substantial burden upon interstate commerce; and second, that the large per cent of reductions in rates or revenue, being "sweeping" in character, also constitutes a substantial burden upon interstate commerce. He does not question the authority under the state statutes (as was done in *Siler v. Louisville, etc.*, 213 U. S. 198) to reduce all the rates in the state by making an entire new schedule applicable to the whole state, but rather that such a large number of reductions, the mere bulk or size of them in itself, constitutes a burden on interstate traffic.

THE BULK ARGUMENT.

Very little serious consideration will be given by any one to the idea that merely the number of reductions, in itself, will make the orders of the Minnesota authorities unconstitutional. The Court has repeatedly held that the states have power to fix whole schedules of rates, each one covering all the passenger or freight rates within the respective states. *Peik v. Chicago R.*, 94 U. S. 164; *Chicago B. & Q. R. v. Iowa,*

94 U. S. 155; *Railroad Commission Cases,* 116 U. S. 307; *Dow v. Beidelman,* 125 U. S. 680; *Covington & Bridge Co. v. Kentucky,* 154 U. S. 204; *Reagan v. Farmers' Loan & Trust Co.,* 154 U. S. 362; *Smyth v. Ames,* 169 U. S. 466; *Chicago, M. & St. P. Ry. v. Tompkins,* 176 U. S. 167.

Nor is the size of the reductions, in and of itself, of any significance in this discussion. If the rates are ten per cent higher than is reasonable and just, you could not object to that amount of reduction; or if the rates were four times as high as is reasonable or just you could not object to a seventy-five per cent reduction.

If ten rates were too high, or if ten thousand rates were too high the mere number alone could not defeat the reduction; otherwise the more rates that were unjustly and unreasonably high, and the higher those rates were, the safer and more secure the railroads would be against any action by the state authorities. If the amount of the reductions is so great, or the number of reductions so large that they leave rates which are unreasonably low, then there may be ground for complaint. But to say that there was a ten per cent or a thirty per cent reduction means nothing to us until we know whether the rates were ten per cent or thirty per cent higher than they ought to be. The mere fact that a thousand rates were reduced must not defeat an action of a state authority, that alone has no bearing whatever on the question. If those thousand rates were so high that they were working an unjust hardship on the public, they ought to be reduced.

Notwithstanding this Court has never even hinted at any limitation upon the number of reductions a state might make, if the particular act was duly authorized by the laws and constitution of the state, and notwithstanding the fact that the Court has repeatedly held that a state could make whole schedules of rates, affecting all the rates within its boundaries; yet in view of the fact that the lower Court has injected the thought in the case, that, independent of the question of the reasonableness of the new rates, the size and number of reductions were "sweeping"; and inasmuch as this idea, if ac-

cepted as true, may have some moral effect on the Court's attitude toward the real issues in the case, we will take time to briefly analyze the facts as thus summarized by the lower court.

A concrete illustration of the deception embraced in the statements of the lower Court as to the size of the reductions ordered is his assertion as to passenger fares. He states on page 413 (Nor. Pac. Record Vol. 1) "The officers of the State of Minnesota by the acts and orders challenged made a general and sweeping reduction of 33 1-3 per cent. in passenger rates within that state, of twenty per cent to twenty-five per cent in rates on general merchandise, of 7.37 per cent on grain, coal, live stock, and lumber, and of 13.58 per cent on in-rates to distributing points." He says substantially the same thing on page 409; and it is again spoken of in his summary on page 414.

The maximum passenger fares in Minnesota on these roads had been three cents for over twenty years, during which time, the total passenger earnings had increased 162 per cent, and the average per mile had increased 67 per cent in the state. (Computed from reports of Minnesota R. & W. Com. for 1888, and 1910.) It is true some passenger fares were reduced one-third, but they were only a small portion of the fares charged and collected in Minnesota.

On the Northern Pacific the reduction of passenger intra-state revenue, during a nine months test period under the operation of the statutes compared to the same period the preceding year, amounted to $8,243, which was 1.1 per cent of all the passenger intra-state earnings. (Nor. Pac. Rec. Vol. 10, Johnson Table 58). On the Great Northern the estimated reduction in intra-state passenger earnings under the new rates was approximately 3½ per cent. While the number of passenger miles hauled was greater, the number of train miles was less during the period under the new rates. (Nor. Pac. Rec. Vol. 1, pages 95-A and 61-A of Annual Report of Commission.) Consequently the cost of the service rendered was substantially the same.

While the reduction in maximum rates on both freight and passenger traffic ranged from 7 per cent to 33 1-3 per cent, yet the total reduction in revenues only aggregated 4½ per cent. (Computed from Exhibits Johnson 63, Johnson 58, and Nor. Pac. Rec. Vol. 1, pp. 259, 264.) The effect of the orders was to remove irregularities and inconsistencies. The revenue under the new rates, ordered by the Minnesota authorities on intra-state traffic on the Northern Pacific was 11.9 mills per ton mile; while the revenue per ton mile on interstate traffic for the same year was 8.3 mills; in other words *the intrastate revenue, yielded by the rates now under attack, averaged 43 per cent greater per ton mile than the revenue collected by this same carrier from its interstate traffic.* (Ex. Elliott 80.) The revenues averaged on the Northern Pacific, per passenger mile 1.94 cents on intra-state traffic as compared to 1.92 cents on interstate traffic. (Nor. Pac. Rec. Vol. 1, p. 262.)

Judge Sanborn says: "The effect of these acts and orders was substantial, direct, controlling and compelling." And so is every order of consequence, made by a tribunal with power to act. There is nothing unconstitutional here. He adds: "They are general and sweeping in their terms, they reduce the fares and rates on the great body of intra-state commerce in the state of Minnesota from 7 to 33 1-3 per cent." Here the plain undisputed record, as we have seen, shows that Sanborn is wrong. Had he inserted the word "maximum" before the words "fares and rates," or had he used the words "a very small portion" instead of "the great body," he would have been closer to the truth. The only way to iron out gross injustices and inequalities is to remove them. Hardly a month passes but what the Interstate Commerce Commission reduces some rates as great, or greater, a percentage than that just stated, and amounting to many times the amount of revenue affected by the Minnesota orders.

THE CENTRAL THOUGHT OF JUDGE SANBORN'S DOCTRINE.

The chief argument relied upon by Judge Sanborn can be stated, in the language used once before, as follows:

Any reduction of a state rate which may affect a competitor in the same business outside of the state, unless an interstate rate be reduced, or which a shipper or passenger may, through the exigencies of the business, make use of on a portion of an interstate haul, is an interference with interstate commerce. (The foregoing is our language summarizing the many pages of discussion in the report of the Master and the decision of the lower Court.)

Judge Sanborn and Mr. Otis give many illustrations in support of their doctrine. Briefly stated, they include:

Reductions to Moorhead and other points on the edge of the state, which favor the shippers and jobbers in the Minnesota towns as compared to the shippers and jobbers just across the state line.

Reductions on hauls which are used by the railroads in making up through interstate rates.

Reductions in the "rate of progression," or rate of increase in the rates per mile, not corresponding to the rate of increase in the rates granted to shippers located beyond the state line.

Reductions of local rates to points in competition with interstate shipments.

EFFECT OF THE SANBORN DOCTRINE.

THE SANBORN DOCTRINE WOULD PRACTICALLY DESTROY STATE REGULATION IN THE UNITED STATES.

The vital part of regulation consists in fixing the maximum rates. Most of us are willing to perform any service in reason, if the compensation is adequate. Railroads are built to make money, and they make it through rates which they charge.

It would be an extremely difficult task to discover any state rate which could be reduced if the principle announced by Judge Sanborn is the law.

Every reduction to a town on the border of the state would affect competing jobbers in the first town beyond the state line.

There could not be a reduction in passenger fares to any point on the edge of the state, or in the center of it, or any where else, that would not make it possible for a man to use the state rate on that portion of an interstate trip, then get off the train, and purchase a ticket for the balance of his trip.

But the doctrine relied upon by the lower Court goes much farther than indicated in the foregoing examples. Judge Sanborn claims that *a reduction of a state rate which disturbs the present relation between state and interstate rates on competitive business is an interference with interstate commerce.*

If the Sanborn test is correct, what reduction in state rates could be made that would not interfere with interstate commerce?

There is practically no movement of traffic between two towns within a state that does not come in competition with some interstate haul.

A typical passage showing the net-work of competitive conditions claimed to be surrounding transportation is the following from the lower Court's opinion (Nor. Pac. Rec. Vol. 1, 403.)

> "If the rates on coal prescribed by chapter 232, Gen. Laws 1907, shall take effect, the result will be substantial reduction in rates on coal from Duluth to southern Minnesota localities. Such a reduction will deprive all these various distributing points in Wisconsin, Michigan, and Illinois of their power to compete with Duluth in its distribution of coal in Minnesota, unless the carriers serving them shall reduce their interstate rates into Minnesota to a parity with those prescribed by chapter 232 from Duluth. If such carriers shall reduce their interstate rates in Minnesota to a parity with the rates prescribed by chapter 232, the relation which now exists between rates on coal from these various distributing points and localities in northern Iowa and in South Dakota will be destroyed, unless rates shall be similarly reduced from these various distributing centers to localities in these two districts."

The same character of discussion could be extended indefinitely as to substantially all freight traffic.

The fact is that if you interfere with interstate commerce by disturbing "the existing relation" between state and interstate rates, whenever you reduce the state rate to any place where interstate competition exists, *then there is not a city, town or hamlet, in the entire state of Minnesota, or any other state, which is not immune from state regulation.*

The possibility of a nullification of state regulation because of universal competitive conditions is now before you for your consideration. The existence of competition at every point is claimed by the carriers in this case. The language of the president of the Great Northern Railroad Company is a demonstration of that fact. Mr. Hill stated on the stand: "I don't know any tonnage in the state that is not tributary or competitive with other lines. There might be one or two stations on the Warroad line; there might be where you would think competition wasn't great, but the competition at Warroad or Lake-of-the-Woods is, in effect, with the water and the Canadian roads, so that the competition exists all the way through. The difference between the long-haul and short-haul applies. So you can't take the map and find a station, that I can recall, where there is no competition." (G. N. 1323.)

The argument of counsel for the carriers before the lower court further illustrates this; they said, (in their brief before the lower court at pages 65, and 68): "It has been seen that if rates are reduced on merchandise from the Company's eastern terminals to Fargo, discrimination against Bismarck will ensue unless rates shall be correspondingly reduced to that city from the Company's eastern terminals; if rates shall be reduced to Bismarck, Billings will be discriminated against unless rates are correspondingly reduced to that point; if rates shall be reduced to Billings, Butte will be discriminated against unless rates be correspondingly reduced from the eastern terminals to that point; if a reduction in rates be made from the eastern terminals to Butte, the relation of rates to Butte, which has always existed on the

Northern Pacific as between St. Paul, Minneapolis and Duluth, the eastern terminals, and Portland, Seattle and Tacoma, the western terminals will be destroyed. In our judgment this destruction will amount to as direct, undue and unlawful discrimination as the destruction of the relation above described between Moorhead and Fargo, between Fargo and Bismarck, between Bismarck and Billings, between Billings and Butte, or between St. Paul, Minneapolis and Duluth, and each of the other distributing points named with regard to the territory served by them in competition."

In eloquent words their learned counsel transforms the present mass of interstate rates into a charming picture of symmetry and beauty. They say (at page 74 of their brief before the lower Court): "The system of freight rates in this country is like a net work of delicate threads so woven as to make a symmetrical whole and to fulfill its design of affording to all whom it may cover equality of right. Rates upon traffic wholly within a state but carried on under precisely the same conditions as interstate traffic covering the same haul, form disseverably with rates on such interstate traffic a thread or a portion of a thread in this net work; and a disseverance of the harmonious relations between such state rates and such interstate rates destroys the symmetry of all that part of the fabric of which the thread which they compose forms a part or with which it is connected."

Page after page of the Master's Report and the opinion of the lower court are devoted to the description of scores of concrete illustrations bearing upon the innumerable phases of the application of the foregoing doctrine, giving in detail the effect on interstate competition. There is practically no limit to the incidents of this character which could be given in this case or any other of the many cases involving reductions of intra-state rates which have been heard before this Court.

While it must be admitted that competition in business does exist probably to as great an extent as claimed, the further contention that a change in any freight rates should be re-

flected to all other points is based on the false assumption that the former relationship was necessarily reasonable. This phase of the proposition will be discussed later. It will be found that such a principle as here advanced by the carriers, and made the basis of the Sanborn doctrine, has been rejected by the Interstate Commerce Commission, and by the carriers themselves in actual practice.

The counsel for the railway companies in this case have fallen into the very fallacy as to the interpretation of the doctrine enunciated in the Eubank case (*Louisville & Nashville Railroad Co. v. Eubank*, 184 U. S. 27) which Mr. Justice Brewer anticipated might possibly be urged at some future time, when he stated (at page 48): "I do not suppose it will be seriously contended that the defendant can invalidate all the local rates which the legislature may see fit to enforce by simply saying that outside of the state it somewhere touches a competitive point and is forced to reduce its interstate rates by reason of the competition there existing."

If the disturbance of the existing relation between competitive state and interstate rates is the correct criterion, no reduction can be made in state rates without interfering with interstate commerce.

The adoption of such a doctrine would eliminate state regulation.

The revolutionary character of such a change in American law and government would be of stupendous importance. Is state regulation worth preserving?

If the power to regulate intrastate rates is not vested in the separate states, where does it lodge? Under the Constitution of the United States, Congress has no power to regulate intrastate rates. [A typical passage showing the lack of congressional control over intra-state rates is to be found in the Eubank case, (*L. & N. R. v. Eubank*, 184 U. S. 27), where the court stated: "If the carrier elects to give *free* transportation of freight or passengers from one point to another in the same state that is a matter of which Congress cannot com-

plain."] Under the decision of the Honorable Circuit Court in the Minnesota rate cases the power of the state to regulate intrastate rates is destroyed.

If neither the Congress nor the states have this power, then it is vested in the railway companies themselves, and as to their intrastate rates the several states are relegated to that period of time when all rates, both state and interstate, were made by the railway companies. There will be no regulation of the rates within the states. The question squarely presented to this Court is, shall the power of the states to regulate intrastate freight and passenger rates be practically eliminated? Until there is something created, some power, some tribunal, to take charge of this department of government, it would be a strange procedure to destroy by judicial action the power which now exists in state governments.

Upon a somewhat similar issue presented in the case of *Addyston P. & S. Co. v. U. S.*, (175 U. S. 211, 231), Mr. Justice Peckham stated:

"If neither Congress nor the state legislatures have such power, then we are brought to the somewhat extraordinary position that there is no authority, state or national, which can legislate upon the subject of or prohibit such contracts. This cannot be the case."

Upon the same issue Mr. Justice Bradley once stated: "There must be a final tribunal somewhere for deciding every question in the world."

In *Gilman v. Phila.*, 3 Wall. 713, the decision was reached mainly on the ground that Congress having failed to assume the control of bridges over navigable waters, the authority had to reside somewhere and must of necessity reside in the states.

There is one modification of the Sanborn doctrine which may suggest itself to the Court's mind. If reductions in state rates are permitted irrespective of any change in the existing relation between state and interstate rates, so long as the reduced rate is greater than the competing interstate

rate, or greater than that portion of the interstate rate applicable to the given haul within the state, a new problem is presented. As an illustration, it might be said the rate from St. Paul to Moorhead, Minn., could be reduced so long as you did not put it below the rate from St. Paul to Fargo, North Dakota, or the intrastate passenger fare might be reduced so long as you did not go below the corresponding portion of the charge for an interstate trip. But even this modification is untenable.

If the reduced state rate to the border towns is still higher than the interstate rates to the towns just beyond, the action of the state legislature would be valid, if lower than such interstate rates it would be invalid. Here we have the constitutionality of a state statute dependent upon the prior judgment of a private company.

Again suppose that the state rate to the border towns of Moorhead, etc., had been reduced to a point higher than the pre-existing interstate rates to Fargo and the other North Dakota points; then after such action by the Minnesota authorities, suppose the railroads should determine to raise such interstate rates. Instantaneously the order fixing the Minnesota intrastate rates would become unconstitutional for they would interfere with the freedom of interstate commerce. In other words we would have the constitutionality of a state statute dependent upon the caprice of a private corporation.

By the mere issue of a new interstate tariff sheet the executive officers of a railway company could nullify a state statute.

Such a situation, and such a doctrine, is unconscionable. The constitutionality of state statutes and federal laws are subject to some higher test than the passing whim or the matured judgment and desires of private concerns.

REASONABLE LOCAL RATES.

As our discussion progresses it will become more and more apparent that a pivotal issue in these contests is what is the

best method for determining the reasonableness of local short haul rates.

The carriers themselves, in one portion of this record, challenge attention to this issue. Mr. Elliott, in testifying on behalf of his company, the Northern Pacific, stated:

"The local rates should be very much higher * * The railroad managers, and owners themselves, have lost track of that fact. * * They have let their local rates run down entirely too low." (Nor. Pac. Rec,, 3135.)

The carriers naturally desire long hauls and high rates. There are two ways of accomplishing this result: first, prove you are entitled to it before a disinterested tribunal; and second, destroy efficient control over the short haul.

The necessity for the reasonable local rate is just as pressing as the demand for the reasonable long haul rate. They have their effect on business and on cities. If you were able to wipe out state lines entirely, you would still have left with you the question of the reasonableness of local rates. The problem of the division of earnings and expenses and value between short hauls and long hauls would still remain.

Review of the Cases.

On some phases of the relative functions of the nation and the states in our dual system of government there is considerable confusion; this is true today in some degree as to the different forms of control over the instrumentalities of commerce. However the recent decisions of this Court concerning state control over safety appliances is but an extension and application of well-recognized doctrines announced in the past. On some other phases of national and state jurisdiction, the law has been thoroughly developed and there has been entire harmony in the decisions for several decades; this is true as to the relative powers of the nation and the states over the regulation of rates. There is a good and sufficient reason for this distinction, which will be developed later.

Our discussion of the cases will be under two general heads: 1. Exclusive jurisdiction of States; and 2. What constitutes a direct burden upon interstate commerce?

I. EXCLUSIVE JURISDICTION OF THE STATES.

(1) OTHER THAN RATE CASES.

Chief Justice Marshall retained, to the fullest extent, entire appreciation of the importance of the Federal judiciary and the national government, thereby securing to us and to posterity one nation, instead of many; yet Chief Justice Marshall was capable also of realizing the value, importance and power of the states in our scheme of government. It is not this government as one nation, nor the several states, but the combination in one federal plan that has rendered such a distinct contribution to the welfare of humanity. It is this federal plan that must be most jealously guarded. A tendency one way or the other, towards centralization or towards decentralization, is dangerous.

In the famous case of *Gibbons v. Ogden*, 9 Wheat. 1, 203, Marshall, commenting on these powers reserved to the states, said:

> "They form a portion of that immense mass of legislation which embraces everything within the territory of a state not surrendered to the general government; all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, etc., are component parts of this mass."

In the *License Tax Cases*, 5 Wall. 462, the Court said: "But very different considerations apply to the internal commerce or domestic trade of the states. Over this commerce and trade Congress has no power of regulation or any direct control. This power belongs exclusively to the states."

The discussion of the court in the *Trade-Mark Cases* (100 U. S. 82) is of considerable significance in a consideration of

the general issues here presented. The jurisdiction of the states was clearly recognized. The Court, calling attention to the fact there was "no requirement that such person shall be engaged in the kind of commerce which Congress is authorized to regulate" (id. p. 97), refused to interpret or to apply the law solely to interstate traffic, saying: "no such distinction is found in the act, but that its broad purpose was to establish a universal system of trade-mark registration," (id. p. 98). The court added:

> "When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations or among the several states, or with the Indian tribes. If not so limited, it is in excess of the power of Congress. If its main purpose be to establish a regulation applicable to all trade, to commerce at all points, especially if it be apparent that it is designed to govern the commerce wholly between citizens of the same state, it is obviously the exercise of a power not confided to congress." (*Trade Mark Cases,* 100 U. S. 96.)

In construing a statute of Missouri concerning the shipping of cattle the Court had occasion to emphasize the exclusive jurisdiction of Congress and of the states over their respective fields: "Power over one is given by the Constitution of the United States to Congress in the same words in which it is given over the other, and in both cases it is necessarily exclusive." *Hannibal & St. Joseph R. v. Husen,* 95 U. S. 465, 469.

In *Lord v. Steamship Co.,* 102 U. S. 541, 543, the issue concerned the power of Congress to regulate certain liabilities of the owners of vessels. The court said Congress had jurisdiction to regulate commerce among the states "but it has nothing to do with the purely internal commerce of the states, that is to say, with such commerce as is carried on between different parts of the same state, if its operations are confined exclusively to the jurisdiction and territory of that state, and do not affect other nations or states, or the Indian tribes. This has never been disputed since the case

of *Gibbons v. Ogden*, 9 Wheat., 1." To the same general effect is *Geer v. Conn.*, 161 U. S. 519.

In *Sands v. Manistee River Imp. Co.*, 123 U. S. 288, 295, the court said:

> "The internal commerce of the state—that is, the commerce which is wholly confined within its limits—is as much under its control as foreign or interstate commerce is under the control of the general government."

The foregoing cases represent the general trend of the decisions.

(2) RATE CASES.

THE DOCTRINE ANNOUNCED BY JUDGE SANBORN THAT A DISTURBANCE OF THE EXISTING RELATION BETWEEN STATE AND INTERSTATE RATES CONSTITUTES AN INTERFERENCE WITH INTERSTATE COMMERCE IS REVOLUTIONARY IN CHARACTER; IT HAS BEEN REPEATEDLY ADVANCED BY THE RAILROADS IN THE PAST WHEN THE SAME ISSUE WAS UNDER CONSIDERATION, BUT NO COURT HAS EVER ADOPTED IT UP TO THE DECISION NOW BEFORE YOU FOR REVIEW; AND PRACTICALLY EVERY FEDERAL COURT RENDERING AN OPINION UPON THIS ISSUE SINCE THAT DECISION, HAS SPECIFICALLY REJECTED THE SANBORN DOCTRINE.

Confusion frequently results from incorporating doctrines from various classes of cases, unless an exhaustive analysis of the different factors involved is made. Other cases have been referred to and will be discussed briefly, but it will be found that the law concerning state and national jurisdiction in the regulation of rates is quite fully developed and has been very clearly defined for many years.

The decisions of the courts relative to transportation charges can be roughly divided under two general heads: those concerning the reasonableness of rates *per se*, and those involving discriminations between different points.

Of those rate cases first described in the preceding paragraph, there are two classes:

(1) One class involves the determination of the reasonableness of rates *per se* on transportation between points located in different states. Upon these cases the national government has sole jurisdiction; this has never been questioned by any decision of the Court since *Wabash, etc., v. Ill.*, 118 U. S. 557.

(2) A second class of rate cases concerns the determination of the reasonableness of rates *per se* on traffic moving (wholly within one state) between points all of which are in the same state; in these cases the said state has sole jurisdiction. This is supported by many cases; there is no decision of this Court to the contrary.

Those decisions of the second group described above, involving the acts and orders of legislatures and commissions attempting to remove discriminations, divide naturally upon the character of the discrimination sought to be removed.

There are three classes of rate discriminations: (a) Those between two hauls, both of which are interstate; (b) Those between two hauls, both of which are between points in the same state; and (c) Those between two hauls, one of which is a state haul, and the other an interstate haul.

Following these divisions we will proceed with our classification.

(3) A third class of rate cases involves attempts to remove discriminations between two or more hauls, all of which are interstate. The federal government has exclusive jurisdiction over these. There is no decision of the Supreme Court to the contrary since *Wabash, etc., v. Illinois*, 118 U. S. 557.

(4) A fourth class of rate cases involves attempts to remove discriminations between two or more hauls, all of which are between points in the same state. The states have exclusive jurisdiction in these cases. This is supported by many

cases; we have been unable to find one decision of this Court to the contrary.

(5) A fifth class of rate cases involves attempts to remove discriminations between two or more hauls, one, or a few of which, are state hauls, and the others are interstate hauls. The states do not have jurisdiction over these cases. This is supported by *Louisville & N. R. v. Eubank*, 184 U. S. 27. We find no decision of this Court to the contrary.

Upon the foregoing propositions we find absolute harmony in the decisions. The issues described are not new, they have been up for consideration repeatedly during the past generation. We will make a brief examination of cases supporting the propositions we have stated.

(A) *The national government has sole jurisdiction over cases involving the reasonableness of rates per se, and discriminations in rates, on interstate hauls.* (1st and 3rd classes, described above.)

This principle was firmly established by the Court in *Wabash etc., v. Ill.*, 118 U. S. 557, after an exhaustive review of the decisions; and it has never been questioned to this day. It will be unnecessary to give extracts from the cases in support of this doctrine. The books are full of them.

(B) *The states have sole jurisdiction over cases involving the reasonableness of rates per se, and discriminations between rates, on traffic moving between points all of which are in the same state* (*and moving wholly within that state*). (2nd and 4th classes, described above.)

We have not been able to find a solitary instance where this Court has ever held the action of a state legislative tribunal to be unconstitutional because of alleged interference with interstate commerce, which, by its express terms or by the interpretation and enforcement of state authorities, applied solely to the reasonableness of rates *per se*, or to dis-

criminations in rates, on hauls between points all of which were in the same state.

In *Wabash, etc., v. Illinois, supra,* the Court, while not sustaining the attempted regulation of interstate commerce (involving the rates from Peoria and Gilman, Ill., to New York), clearly recognized to the fullest extent "that there is a commerce wholly within the state which is not subject to the constitutional provision." (id. p. 565.) Further the Court stated:

"Of the justice or propriety of the principle which lies at the foundation of the Illinois statute it is not the province of this Court to speak. As restricted to a transportation which begins and ends within the limits of the state it may be very just and equitable, and it certainly is the province of the state legislature to determine that question." (id. p. 577.)

The exclusive jurisdiction of the states over intra-state commerce was clearly stated by the federal court in *Texas & Pac. Ry. Co., v. R. R. Com. of La.,* 183 Fed. 1005, 1007, in the following language:

> "So, too, the Railroad Commission of Louisiana has authority to regulate rates of transportation on all shipments beginning and ending in the state. In their respective spheres each is supreme, and neither can infringe the authority of the other."

The case of *Railroad Co. v. Maryland,* 21 Wall 456, 471, 473, 475, involved a tax of one-fifth of the gross receipts on passenger traffic between Baltimore and Washington, also a limitation of $2.50 on through transportation. It was claimed to be a restriction upon free intercourse between states. Mr. Justice Bradley delivered the opinion of the Court. The state was sustained. A notable passage in the opinion is as follows:

> "Had the state built the road in question it might, to this day, unchallenged and unchallengeable, have charged two dollars and fifty cents for carrying a passenger between Baltimore and Washington. So might the railroad company, under authority from the state, if it saw fit to

do so. These are positions which must be conceded. No one has ever doubted them.

"This unlimited right of the state to charge, or to authorize others to charge, toll, freight, or fare for transportation on its roads, canals, and railroads, arises from the simple fact that they are its own works, or constructed under its authority. It gives them being. It has a right to exact compensation for their use. It has a discretion as to the amount of that compensation. That discretion is a legislative—a sovereign—discretion, and in its very nature is unrestricted and uncontrolled. The security of the public against any abuse of this discretion resides in the responsibility to the public of those who, for the time being, are officially invested with it.

"In view, however, of the very plenary powers which a state has always been conceded to have over its own territory, its highways, its franchises, and its corporations, we cannot regard the stipulation in question as amounting to either of these unconstitutional acts. It is not within the category of such acts. It may, incidentally, affect transportation, it is true; but so does every burden or tax imposed on corporations or persons engaged in that business. Such burdens, however, are imposed *diverso intuitu*, and in the exercise of an undoubted power."

It was suggested:

"If, however, state institutions should so combine or become so consolidated and powerful as, under cover of irrevocable franchises already granted, to acquire absolute control over the transportation of the country, and should exercise it injuriously to the public interests, every constitutional power of Congress would undoubtedly be invoked for relief."

The concluding passage is a frank recognition of the limitations upon the courts:

"But whether the power to afford relief from onerous exactions for transportation does, or does not, exist in the General Government, we are bound to sustain the constitutional powers and prerogatives of the States, as well as those of the United States, whenever they are brought before us for adjudication, no matter what may be the consequences."

In *Wabash etc., v. Illinois,* 118 U. S. 557, 569, Mr. Justice Miller made the following summary of the issues determined in *Chicago B. & Q. v. Iowa,* 94 U. S. 155, and *Peik v. C. & N. W.* 94 U. S. 164: "The great question to be decided, and which was decided, and which was argued in all those cases, was the right of the State, within which a railroad company did business, to regulate or limit the amount of any of their traffic charges."

The authority of the state to prescribe maximum rates on transportation within the boundaries of such state was fully recognized in *Reagan v. Farmers' Loan & Trust Co.,* 154 U. S. 362, 393.

To the same effect was the decision in *Reagan v. Mercantile Trust Co.,* 154 U. S. 413, where it is stated at page 417: "we are of opinion that the Texas & Pac. Ry. Co. is, as to business done wholly within the State, subject to the control of the State in all matters of taxation, rates, and other police regulations."

The issue of interference with interstate commerce was raised recently in *Northern Pac. Ry. v. No. Dak.* 216 U. S. 579. The only comment upon this issue made by the Court was, referring to the decision of the state court: "The grounds of its decision were that the act referred only to transportation wholly within the state and therefore was not bad underArt. I. Sec. 8, thus removing that question." (id. p. 580.)

(*C*) *The removal of discrimi[illegible]ns between two rates, one of which is on an intra-state haul, and the other on an inter-state haul, is not subject to state regulation.* (5th class of rate cases as described on a preceding page.)

This is the result of the decision of the Court in *Louisville & N. R. v. Eubank,* 184 U. S. 27. We find no decision to the contrary of this doctrine. We find no decision stating affirmatively that the Interstate Commerce Commission or the courts, under the common law, would have jurisdiction over such discriminations. The Interstate Commerce Commission has specifically disclaimed jurisdiction, under the Act to Regulate Commerce, over this class of cases. *Saunders & Co. v. South-*

ern Express Co., 18 I. C. C. Rep. 415, 422, *et seq.* In this case Mr. Commissioner Lane quotes from the Act to Regulate Commerce:

> "That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one state and not shipped to or from a foreign country from or to any state or territory as aforesaid."

And he makes the following comment thereon:

> "This language seems to have but one meaning, and that is that, although the Congress constitutionally may give and in fact has given to the national commission authority to control and regulate the rates to be demanded and accepted by interstate carriers on interstate traffic, it has excluded us from the exercise of any such powers as to the purely state traffic of interstate carriers. Whatever authority may be vested in the courts for the redress of such wrongs, it seems reasonably clear that this Commission, under such circumstances as are disclosed on the record, may not lawfully interfere by an order, the purpose of which is directly or indirectly to affect the rates imposed upon the defendant by the order of the Alabama Commission."

The case of *Louisville & N. R. Co. v. Eubank, supra*, presented an issue relative to a state statute, which by the construction of the state courts, did attempt to remove, and therefore to regulate discriminations between state shipments and interstate shipments. This Court held that to be an attempted regulation of interstate commerce, and beyond the jurisdiction of the state legislature.

The Kentucky statute when dealing solely with discriminations made by intra-state rates, being sustained by the Court in the former case of the same complainant against Kentucky, 183 U. S. 503, clearly shows the line of demarcation. In the latter case the issue was presented and was considered, as to the possible effect of the lower intrastate rates upon interstate commerce. But it was not sought by the state in that case to apply the statute to discriminations between interstate and intra-state shipments, therefore under those cir-

cumstances the only effect of its enforcement upon interstate commerce must be indirect. And this was precisely the conclusion arrived at by the Court in that case.

> "The final contention, that section 218 of the constitution of Kentucky operates as an interference with interstate commerce, and is therefore void, need not detain us long.
>
> "It is plain that the provision in question does not in terms embrace the case of interstate traffic. It is restricted in its regulation to those who own or operate a railroad within the State, and the long and short distances mentioned are evidently distances upon the railroad line within the State. The particular case before us is one involving only the transportation of coal from one point in the State of Kentucky to another by a corporation of that State.
>
> "It may be that the enforcement of the state regulation forbidding discrimination in rates in the case of articles of a like kind carried for different distances over the same line may somewhat affect commerce generally; but we have frequently held that such a result is too remote and indirect to be regarded as an interference with interstate commerce; that the interference with the commercial power of the general government to be unlawful must be direct, and not the merely incidental effect of enforcing the police powers of a State. *New York, Lake Erie and Western Railroad v. Pennsylvania,* 158 U. S. 431, 439; *Henderson Bridge Co. v. Kentucky,* 166 U. S. 150.
>
> "A discussion of this subject will be found in the opinion of this court in *Louisville & Nashville Railroad v. Kentucky,* 161 U. S. 677, 701, where the same conclusion was reached."
>
> (*Louisville & N. R. v. Kentucky,* 183 U. S. 503, 518, 519.)

The doctrines of these two Kentucky cases between the same parties before the same court are in thorough harmony with each other. The interpretation we make of these decisions is in entire accord with all prior and all subsequent decisions of this Court. Interpretations in substantial harmony with this have been announced by practically all subsequent decisions of the lower federal courts, except those in which Judge Sanborn has presided.

How can a discrimination between a state rate and an interstate rate be regulated?

The method proposed by the complainants for regulating state rates, and for removing discriminations between state and interstate rates, is to leave the matter entirely to the carriers. The public has long since abandoned that policy.

As has been stated, there are three kinds of discriminations (1) between interstate rates; (2) between intra-state rates; and (3) between rates, one of which is an interstate, and the other an intra-state rate. The first is regulated by federal authority, and the second by state authority. If neither the state authorities, nor the Interstate Commerce Commission, has power, at present, to remove discriminations of the third class, made by state and interstate rates together, where is this power lodged? This must be accepted as a necessary incident to our present dual form of government, or else the courts will have jurisdiction in such cases.

For the purpose of argument, let us assume that the courts have such power; and that the rate adjustment resulting from the proposed changes in Minnesota state rates, accompanied by no changes in the interstate rates, would cause an unjust discrimination in fact; and that this is now properly presented to the federal courts, with proper parties in the case, for the purpose of removing any unjust discriminations that may exist. How would the Court proceed to exercise its authority?

The Basic Issue is the Reasonableness of the Rates *per se*.

How does a federal tribunal act, or a state court act, in any case where a discrimination is established—If it is a just discrimination it remains untouched. If the discrimination is unjust, then one or the other of the rates in question must yield to a change, one or the other must be raised or lowered, this depending entirely upon which one is at fault, the ultimate question being, *Is the rate reasonable.* The rate which is not reasonable must be the one to change, and this precise question is always answered by court or commission where a discrim-

cumstances the only effect of its enforcement upon interstate commerce must be indirect. And this was precisely the conclusion arrived at by the Court in that case.

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The method proposed by the complainants for regulating state rates, and for removing discriminations between state and interstate rates, is to leave the matter entirely to the carriers. The public has long since abandoned that policy.

As has been stated, there are three kinds of discriminations (1) between interstate rates; (2) between intra-state rates; and (3) between rates, one of which is an interstate, and the other an intra-state rate. The first is regulated by federal authority, and the second by state authority. If neither the state authorities, nor the Interstate Commerce Commission, has power, at present, to remove discriminations of the third class, made by state and interstate rates together, where is this power lodged? This must be accepted as a necessary incident to our present dual form of government, or else the courts will have jurisdiction in such cases.

For the purpose of argument, let us assume that the courts have such power; and that the rate adjustment resulting from the proposed changes in Minnesota state rates, accompanied by no changes in the interstate rates, would cause an unjust discrimination in fact; and that this is now properly presented to the federal courts, with proper parties in the case, for the purpose of removing any unjust discriminations that may exist. How would the Court proceed to exercise its authority?

The Basic Issue is the Reasonableness of the Rates *per se*.

How does a federal tribunal act, or a state court act, in any case where a discrimination is established—If it is a just discrimination it remains untouched. If the discrimination is unjust, then one or the other of the rates in question must yield to a change, one or the other must be raised or lowered, this depending entirely upon which one is at fault, the ultimate question being, *Is the rate reasonable.* The rate which is not reasonable must be the one to change, and this precise question is always answered by court or commission where a discrim-

ination is remedied, the tribunal in each case deciding which of the two or more rates is at fault. If it is found, in accordance with proper legal methods and presumptions, that the state rates are unreasonably low, the Court would set them aside. Upon the other hand *if the Court should find the state rates reasonable and the interstate rates unreasonably high, the latter fact, by no possible torturing of legal doctrine, can be made into an argument for a raise of the state rates.*

In this, as in all controversies involving the issues of unjust discriminations, the issues finally rest upon the question are the rates involved reasonable or unreasonable. It is a long, hard, complicated task to frame any feasible standard of reasonableness, but the difficulty of the task does not relieve us of the burden of performing it. It will probably be many years before we arrive at any very satisfactory conclusions in regard to this. In the meantime we must content ourselves with the closest possible approximations to what appeals to us as being reasonable. When the Interstate Commerce Commission has adopted a wrong theory as to what is the law concerning the elements of a reasonable rate, this Court has been ready to dismiss bills in equity seeking the enforcement of such orders. When the line of interference is close between state and interstate regulation then it behooves the Court to give greatest consideration to this problem.

There are three ways to remove a discrimination: one is to lower the higher rate; a second method is to raise the lower rate; and a third is to lower the former and raise the latter until both are on a parity. Whenever dealing with an alleged discrimination the Commission or Court must determine in some way, arbitrarily or approximately, which should be the one to be changed. These questions of discrimination resolve themselves, in the last analysis, to the determination of what is a reasonable rate in itself.

As to these matters there seems to be constantly running in Judge Sanborn's mind two thoughts: one that discriminations between state and interstate rates are forbidden by the Interstate Commerce Act, and the other that such discriminations

are unjust in fact, but not in law, and yet, in some manner, that they are unjust in law, presumably under the common law. Here there seems to be great confusion in the Court's mind, for elsewhere he concedes there is no unjust discrimination in law; and, following up this latter idea, if that be true how can this Court have any jurisdiction over it? In order to present clearly this situation just described we will give a couple of typical extracts from the lower Court's opinon. He says:

> "The fares and rates and the traffic in intrastate commerce were so inextricably interwoven with the fares and rates and the traffic in interstate commerce that a general and substantial reduction of the fares and rates in either by its necessary operation compelled a similar reduction in the other, *because the interstate commerce act forbids the discrimination that would otherwise result* and because the traffic will move only at the lowest available rates.
>
> * * * * * *
>
> "This effect was unavoidable because *the interstate commerce law prohibited the companies from giving to Minnesota towns* and cities the undue and unreasonable advantage and from subjecting the cities and towns of other states in the vicinity to the undue and unreasonable disadvantages which a maintenance of their former interstate fares and rates and the prescribed local fares and rates would have wrought, and because passengers and freight will move at the lowest available rates."
> (Nor. Pac. Rec. Vol. 1, p. 413.) (Italics are ours.)

If the lower court was correct, and maintaining such dissimilarity between state and interstate rates would be working a discrimination which "the interstate commerce act forbids", or that "the interstate commerce law prohibited the companies from giving to Minnesota towns," etc., then this is not the correct tribunal to first consider such alleged discriminations, such issues must first be passed upon by the Interstate Commerce Commission, (*Texas & Pacific Ry. Co. v. Abilene Oil Co.*, 204 U. S. 426); and further the parties complainant are not the proper ones, the railroads cannot set up such discrimination before this tribunal, the injured shipper must raise that issue. *Smiley v. Kansas*, 196 U. S. 447, 457.

The legal proposition stated by the lower Court, that maintaining such rates is forbidden by the interstate commerce act, is not a correct statement of the law. The interstate commerce act specifically limits its own application to interstate rates, (Section 1 of the Act to Regulate Commerce) and alleged discriminations between state and interstate rates have been held not to come under the provisions of the act. (*Saunders v. So. Exp. Co.*, 18 I. C. C. Rep. 145.) Involuntary discriminations are not covered by the act to regulate commerce. *In the matter of Freight Rates between Memphis, etc.*, 11 I. C. C. Rep. 180.

If there is a kind or class of discriminations not within the jurisdiction of the states (*Louisville & N. R. v. Eubank, supra*) and not under the control of the Interstate Commerce Commission (*Saunders v. Southern Express Co., supra*) it must either be a necessary incident to our dual form of government, or else such discriminations are still subject to the jurisdiction of the courts, under the common law. The mere nullifying of the state's power to regulate rates by no means remedies this situation, for such discriminations might exist all over the state of Minnesota by virtue of the action of the railway companies; if they did so exist where could the citizen of the state go for relief? The courts must take jurisdiction or there exists a wrong without a remedy. Granting for the moment, for the sake of argument, that either the state or the interstate rates must yield, that the proper parties are before the court, and that this tribunal has jurisdiction to forbid the alleged discriminations under the common law, even though it enjoins a state legislature, upon the theory that where there is a conflict between the state and interstate powers the former must yield—How then would this Court proceed to determine which rate was unreasonable, the higher interstate rate or the lower state rate? It would be a strange travesty on justice to merely assume that the voluntary rates of the carriers must be reasonable, and set aside rates made after exhaustive investigation by a state authority.

No court has ever before announced the doctrine that interstate rates should serve as a standard or test of what is rea-

sonable on intra-state business. Such a rule would be directly contrary to the spirit of the one adopted by the Court in *Louisville & N. R. Co. v. Eubank, supra.* While it is true that in the *Eubank Case,* the attempt was made to compel the Louisville & Nashville Ry. Co. to reduce its 25 cent rate between Frankfort and Louisville to the level of the 12 cent rate between Nashville and Louisville, and this Court held that such a construction of the constitutional provision of the State of Kentucky by its courts would render it unconstitutional as in conflict with the commerce clause of the Federal Constitution, is it not a fact that in the Minnesota rate cases the ultimate effect of the decision of the Circuit Court would be to regulate the state rates by the measure of the interstate rates? This would give to the Supreme Court a test for the state rate, which the Supreme Court has denied to the state legislature as such test for the said state rate.

If it be found that the proposed Minnesota rates, in and of themselves, are reasonable, it removes the necessity to consider the reasonableness of the interstate rates. There are many illustrations of this principle. *East Tenn. V. & G. Co. v. I. C. C.,* 181 U. S. 1, is one of the cases where the court held that a discrimination may exist between the rates on a long and a short haul which would not be illegal, if it were found that the short haul rate was reasonable in and of itself.

In *Indianapolis Frt. B. v. C. C. C. & St. L. Ry. Co.,* 15 I. C. C. Rep. 504, 513, the Commission held that:

> "Because the revenue per ton per mile yielded by rates from farther distant points is less than that yielded by rates from a shorter distant point, it does not necessarily follow that the latter is subjected to unjust discrimination."

A similar doctrine was announced by the Commission in *Montgomery Frt. Bureau v. L. & N. R. R. Co.,* 17 I. C. C. Rep. 521, 529.

The reasonableness of the rate in and of itself has long been recognized by the Court as the ultimate question in most of these rate cases. The difficulties attendant upon such an

inquiry merely demonstrate, what we all admit, that the matter is complex and hard to deal with. Other decisions of the Court emphasizing this fundamental issue of the reasonableness of the rates *per se* are: *Southern Pac. Co. v. I. C. C.*, 219 U. S. 433, 443-445, *Interstate Com. Com. v. Stickney*, 215 U. S. 98, 109, *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 443, 444.

II. WHAT CONSTITUTES A DIRECT BURDEN UPON INTERSTATE COMMERCE?

The definite question as to what kind of regulations directly affect interstate commerce has been a pivotal issue in many cases. From the very earliest decisions we find the doctrine clearly recognized that state regulations, of all classes, not affecting interstate commerce, are exclusively under the jurisdiction of state authorities.

The difficulty has come in determining whether a given regulation affects interstate commerce. It is impossible for a state to regulate the manner of equipping or handling a car or an engine engaged in hauling both state and interstate traffic, without coming in conflict with interstate regulations on the same object. The decisions have long since recognized this fact. However this Court has held without a single exception, that fixing state rates, in its practical operation, does not have a direct affect on interstate commerce. There is a strong reason for this distinction. The public is protected so far as its safety is concerned by national regulations of the instrumentalities of commerce; for the same cars and engines, so regulated, are hauling the state traffic; here the welfare of the public is abundantly guarded in the absence of state regulation. The situation is entirely different as to rates. The regulation of interstate rates may be most thorough without having any appreciable effect on state rates except along the edges of the state. Removal of state regulation of rates leaves the public subject to the will and caprice of the railway companies in the establishment of reasonable short haul local rates.

There are many leading cases dealing broadly with these general issues, a few of which we will discuss briefly; we will then confine our discussion somewhat more specifically to decisions relating to the regulation of rates.

(A) OTHER THAN RATE CASES.

While Marshall plainly recognized that the purely internal "concerns" of a state are reserved for state regulation, yet he qualified this by limiting it to such "concerns" as "do not affect other states." (*Gibbons v. Ogden, supra,* at page 194.) This doctrine has been greatly amplified and interpreted in subsequent decisions of the Supreme Court. For many years it has been held that the effects of state regulations upon interstate commerce are divisible under two general heads: 1st, those which are direct; and 2d, those which are indirect. The broad qualifying clause of Justice Marshall's, limiting such regulations to those that "do not affect other states", no longer states the true rule, unless the word "directly" is understood to be embraced in the thought expressed by that clause. This Court early held that even though a state regulation indirectly affected other states or interstate commerce, yet such regulation was within the jurisdiction of the states, otherwise there "could be no state regulation." The further and more full interpretation of *what can legitimately be considered as having a direct or indirect effect* upon interstate commerce has been the subject of many decisions.

One of the early cases to interpret *Gibbons v. Ogden, supra,* was the case of *The Daniel Ball,* 10 Wall. 557. Commenting upon the jurisdiction of Congress, the Court stated (page 565): "This limitation necessarily excludes from Federal control all commerce not thus designated, and of course that commerce which is carried on entirely within the limits of a State, and does not extend to or affect other States".

The Louisiana statute involved in the case of *Hall v. DeCuir,* 95 U. S. 485, "attempted to regulate the manner of carrying passengers on an instrument" of interstate commerce while engaged in interstate commerce. The following passage, from

the concurring opinion by Mr. Justice Clifford, shows how directly the instrumentalities of interstate commerce would be affected by legislation of the kind under consideration:

> "Unless the system or plan of regulation is uniform, it is impossible of fulfillment. Mississippi may require the steamer carrying passengers to provide two cabins and tables for passengers, and may make it a penal offense for white and colored persons to be mixed in the same cabin or at the same table. If Louisiana may pass a law forbidding such steamer from having two cabins and two tables—one for whites and the other for colored persons—it must be admitted that Mississippi may pass a law requiring all passenger steamers entering her ports to have separate cabins and tables, and made it penal for white and colored persons to be accommodated in the same cabin or to be furnished with meals at the same table. Should State legislation in that regard conflict, then the steamer must cease to navigate between ports of the States, having such conflicting legislation, or must be exposed to penalties at every trip." (*Hall v. DeCuir, supra,* at page 497.)

In the opinion of the Court the limits of the decision are clearly marked: "We think this statute, to the extent that it requires those engaged in the transportation of passengers among the States to carry colored passengers in Louisiana in the same cabin with whites, is unconstitutional and void." (id. at page 490.)

In the "orginial package cases" going up from the Iowa Court, this Court, after citing *Gibbons v. Ogden, supra,* and outlining the exclusive powers of Congress, stated:

> "This power, however, does not comprehend the purely internal domestic commerce of a state which is carried on between man and man within a State or between different parts of the same State." (*Kidd v. Pearson,* 128 U. S. 1, 17).

The Court quoted, with approval, its former opinion in the case of *Hall v. DeCuir, supra,*

> "Legislation (by a State) may in a great variety of ways affect commerce and persons engaged in it, without constituting a regulation of it within the meaning of the

Constitution," unless, under the guise of police regulations, it "imposes a direct burden upon interstate commerce," or "interferes directly with its freedom." (id. 23.)

The Court also said in this case:

> "The police power of a State is as broad and plenary as its taxing power; and property within the State is subject to the operations of the former so long as it is within the regulating restrictions of the latter. (id. 26)

The power of the states to make regulations which affect interstate commerce indirectly has been frequently sustained.

The recent decision in *Missouri Pac. Ry. Co. v. Kansas,* 216 U. S. 262, 283, 284, gives recognition to this power of the state. Although the necessary effect of the state's order was to require the company to build terminal facilities at the state line or else to haul the passenger train beyond the border of the state 20 miles to Butler, yet it was held not necessarily to constitute a direct burden upon interstate commerce "even if the performance of the duty of furnishing adequate local facilities in some respects affected interstate commerce."

In reply to the claim that the regulation, although not in terms yet in practical operation affecting an interstate train, necessarily interfered with interstate commerce, the Court stated:

> "But this simply confounds the distinction between state control over local traffic and Federal control over interstate traffic." *Mo. Pac. Ry. Co. v. Kansas, supra,* 283.

Another recent decision giving full recognition to the jurisdiction of the state is that one rendered in *Missouri Pac. Ry. Co. v. Larrabee Flour Mills Co.,* 211 U. S. 612, where the Court considered it unnecessary to determine just how "the separateness of control is to be accomplished," but found it necessary to sustain the relative powers of the state and the nation. The Court stated:

> "The roads are, therefore, engaged in both interstate commerce and that within the State. In the former they are subject to the regulation of Congress; in the latter to

that of the State, and to enforce the proper relation between Congress and the State the full control of each over the commerce subject to its dominion must be preserved." (id. 620.)

An Ohio statute requiring each company to stop three of its regular passenger trains daily at every town of over 3,000 inhabitants was sustained in *Lake Shore & Mich. So. R. v. Ohio,* 173 U. S. 285. "The statute," the Court stated (at page 300 of the opinion) "in question is not directed against interstate commerce. Nor is it within the necessary meaning of the Constitution a regulation of commerce, although it controls, in some degree, the conduct of those engaged in such commerce."

Whether the owners of steamers engaged in interstate commerce, were liable for damages under a state law was the issue in *Sherlock, et al., v. Alling,* 93 U. S. 99. The Court held them subject to the state law, making the following summary of the cases holding certain state regulations to be burdens upon interstate commerce:

> "In supposed support of this position numerous decisions of this Court are cited by counsel, to the effect that the States cannot by legislation place burdens upon commerce with foreign nations or among the several States. The decisions go to that extent, and their soundness is not questioned. But, upon an examination of the cases in which they were rendered, it will be found that the legislation adjudged invalid imposed a tax upon some instrument or subject of commerce, or exacted a licence fee from parties engaged in commercial pursuits, or created an impediment to the free navigation of some public waters, or prescribed conditions in accordance with which commerce in particular articles or between particular places was required to be conducted." (id. 102.)
>
> "Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution." (id. 103.)

Other similar cases are:

State Tax on Railway Gross Receipts, 15 Wallace 284, 293, where the Court said: "No doubt every tax upon personal property, or upon occupations, business, or franchises, affects more or less the subjects, and the operations of commerce. Yet it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution."

The Winnebago, 205 U. S. 354, involved a lien, under the state laws, upon a vessel engaged in interstate commerce. The Court quoted, with approval, its holding in the case of *Sherlock, et al. v. Alling,* 93 U. S. 99:

> "The State may pass laws enforcing the rights of its citizens which affect interstate commerce but fall short of regulating such commerce in the sense in which the Constitution gives exclusive jurisdiction to Congress." (*The Winnebago, supra,* 362.)

Pennsylvania R. v. Hughes, 191 U. S. 477. The case involved a state liability law, which was sustained, in the absence of Congressional legislation. The Court said:

> "It is well settled that the State may make valid enactments in the exercise of its legislative power to promote the welfare and convenience of its citizens, although in their operation they may have an effect upon interstate traffic." (id. 488.)

Allen v. Pullman's Palace Car Co., 191 U. S. 171. The Court stated with reference to former cases relative to the jurisdiction of states:

> "While they show a zealous care to preserve the exclusive right of Congress to regulate interstate traffic, the corresponding right of the State to tax and control the internal business of the State, although thereby foreign or interstate commerce may be indirectly affected, has been recognized with equal clearness." (id. 180.)

Field v. Barber Asphalt Paving Co., 194 U. S. 618. This case concerned the validity of certain tax bills, claimed to be in violation of the federal constitution. The Court upon this point said:

"The right of a State in the exercise of the police power to make regulations which indirectly affect interstate commerce has been frequently sustained. In the present case it may be that the use of this kind of asphalt, under municipal authority conferred by the State, will in a limited degree affect interstate commerce, but it certainly is not one of those direct interferences with the power over and express control of the subject given by the Constitution to Congress. In this day of multiplied means of intercourse between the States there is scarcely any contract which cannot in a limited or remote degree be said to affect interstate commerce. But it is only direct interferences with the freedom of such commerce that bring the case within the exclusive domain of Federal legislation." (id. 623.)

(B) RATE CASES.

THE EFFECT OF STATE RATES UPON INTERSTATE RATES, BECAUSE OF COMPETITION BETWEEN LOCALITIES, HAS FREQUENTLY BEEN IN ISSUE, AND DURING THE ENTIRE HISTORY OF RATE REGULATION IT HAS NEVER BEEN HELD BY THIS COURT TO CONSTITUTE A DIRECT BURDEN UPON INTERSTATE COMMERCE.

The Court has consistently held that some things directly affect interstate commerce, and constitute a burden upon the same; upon some matters it has been hard to draw the line of distinction between that which has a direct and an indirect effect upon commerce; upon others the Court has consistently ruled, from the beginning, that they do not constitute a direct burden upon interstate commerce. In the last class belong the making of state rates.

If this were not true we would have no dual form of government so far as the regulation of rates is concerned.

THE GRANGER CASES.

The issue that the fixing of state rates interfered with interstate commerce was presented in the original *Granger Cases*. In the Seventies the State of Iowa fixed an entire schedule of

rates making large reductions, said to aggregate 30 per cent. The railroads urged the interference argument before the Supreme Court, and in reply to this contention the Court said:

> "The objection that the statute complained of is void because it amounts to a regulation of commerce among the States, has been sufficiently considered in the case of *Munn v. Illinois*. This road, like the warehouse in that case, is situated within the limits of a single State. Its business is carried on there, and its regulation is a matter of domestic concern. It is employed in state as well as in interstate commerce, and, until Congress acts, the State must be permitted to adopt such rules and regulations as may be necessary for the promotion of the general welfare of the people within its own jurisdiction, even though in so doing those without may be indirectly affected." (*Chicago, B. & Q. R. v. Iowa*, 94 U. S. 155, 163.)

THE RAILROAD COMMISSION CASES.

In the leading one of the "Railroad Commission Cases," *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307, the issue of interference was squarely raised. In this case it was claimed (quoting from the brief by Mr. Campbell and Mr. Russell for appellees) that: "The statute of Mississippi is designed to alter, and to disturb and derange the plan adopted by the four States for the administration of the affairs of the company, and to enable Mississippi to dictate the mode of operation of the company. The result of the co-operative operation of the company in these four states with the same powers of administration for transportation through each and all of the States, is to establish a community of right and interest which neither of them can separately and partially derange or transform," citing a large number of cases in support of the same. (id. 321.)

Mr. W. P. Hamilton also filed a brief in the case of *Stone v. Farmers' Loan & Trust Co., supra*, on behalf of appellees, (again quoting from the description of argument contained in the reports, 116 U. S. at page 323), "further contending that inasmuch as the road was one continuous property running through four States, it was a highway for commerce within

the jurisdiction of Congress; and inasmuch as the act of Mississippi assumed to regulate the rates upon commerce external to the State and passing through it, as well as upon domestic commerce within the State, it infringed that clause of the Constitution which confers upon Congress the power to regulate commerce among the several states." This was the main proposition relied upon by Mr. Hamilton; in support of it he cited many cases.

The lower Court, in the case just referred to, sustained the contentions of the railroads, and reached conclusions almost identical with those of Judge Sanborn. The Supreme Court summarily dismissed this contention in the following language:

> "It (the state) may, beyond all question, by the settled rule of decision in this court, regulate freights and fares for business done exclusively within the State, and it would seem to be a matter of domestic concern to prevent the company from discriminating against persons and places in Mississippi.....Legislation of this kind to be unconstitutional must be such as will necessarily amount to or operate as a regulation of business without the State as well as within." (id. pp. 334, 335.)

While the case is not analogous to those pending, in that the Commission had not established rates; yet the case is closely similar in that the railroads and the lower court upheld the idea of the closely interwoven relations between state and interstate commerce, necessitating exclusive federal control.

SMYTH V. AMES.

In *Smyth v. Ames*, 169 U. S. 466, it was claimed at the trial before the lower court, that the proposed rates would interfere with interstate commerce. Much testimony upon this issue was adduced; the effect of reduced rates to Omaha upon rates to Council Bluffs, across the river, was especially insisted upon. Both the lower court and the Supreme Court held against the railroads upon this issue. The language of the Supreme Court was unqualified:

"Until Congress, in the exercise either of the power specifically reserved by the eighteenth section of the act of 1862 or its power under the general reservation made of authority to add to, alter, amend or repeal that act, prescribes rates to be charged by the railroad company, it remains with the States through which the road passes to fix rates for transportation beginning and ending within their respective limits." (id. p. 522.)

In the opinion of the lower court, by Mr. Justice Brewer, then at Circuit, the specific issue of interference was referred to as being raised by the railroads:

"Again, it is insisted that this act interferes with interstate commerce, in two ways: First, it establishes a classification of freights different from that which prevails west of Chicago; and, in the second place, by reducing local rates, it necessarily reduces the rates on interstate business."

As to the second proposition, Justice Brewer stated:

"Neither can I understand how the reduction of local rates, as a matter of law, interferes with interstate rates. It is true the companies may, for their own convenience, to secure business, or for any other reason, re-arrange their interstate rates, and make them conform to the local rates prescribed by the statute, but surely there is no legal compulsion. The statute of the state does not work a change in interstate rates, any more than an act of Congress prescribing interstate rates would legally work a change in local rates. Railroad companies cannot plead their own convenience, or the effects of competition between themselves and other companies, in restraint of the otherwise undeniable power of the state." (*Ames v. Union Pac. Ry. Co.*, 64 Fed. 165, 171, 172.)

Another leading case is *Covington and Cincinnati Bridge Co. v. Ky.*, 154 U. S. 204. A passage frequently quoted is the following (on page 209):

"The adjudications of this court with respect to the power of the States over the general subject of commerce are divisible into three classes. First, those in which the power of the State is exclusive; second, those in which the States may act in the absence of legislation by Con-

gress; third, those in which the action of Congress is exclusive and the States cannot interfere at all.

"The first class, including all those wherein the States, have plenary power, and Congress has no right to interfere, concern the strictly internal commerce of the State, and while the regulations of the State may affect interstate commerce indirectly, their bearing upon it is so remote that it cannot be termed in any just sense an interference. Under this power, the States may authorize the construction of highways, turnpikes, railways, and canals between points in the same state, and regulate the tolls for the use of the same, *Railroad v. Maryland*, 21 Wall. 456."

The same issue was specifically raised in *Louisville & Nashville R. v. Kentucky*, 183 U. S. 503, 518, where the Court made the ruling, which we have quoted once before:

"It may be that the enforcement of the state regulation forbidding discrimination in rates in the case of articles of a like kind carried for different distances over the same line may somewhat affect commerce generally; but we have frequently held that such a result is too remote and indirect to be regarded as an interference with interstate commerce; that the interference with the commercial power of the general government to be unlawful must be direct, and not the merely incidental effect of enforcing the police powers of a State."

RECENT CASES.

During the past year or so the issue of interference with interstate commerce has been presented in the federal courts, involving intrastate rates in the states of: Kentucky (*Louisville & N. R. v. Siler, et al.*, 186 Fed. 176), Arkansas (*St. Louis S. W. Ry Co. v. Allen, et al.*, 187 Fed. 290), Missouri (*St. Louis, etc., v. Hadley*, 168 Fed. 317), Oregon (*Oregon R. and Nav. Co. v. Campbell*, 173 Fed. 957; *Southern R. Co. v. Campbell*, 189 Fed. 182), Nevada (*Woodside v. Tonapah, etc.*, 184 Fed. 358), and Iowa (*Wells Fargo & Co. v. D. J. Palmer, et al.*, decided Sept. 16, 1911).

In every one of these cases the decision has been against the doctrine adopted by Judge Sanborn.

A few significant passages from these cases, on various phases of the issue under consideration, will be presented.

The case of *Louisville, etc., v. Siler, supra,* concerned the power of the Kentucky Commission to adopt and promulgate orders under the Kentucky statute. The question of interference with interstate commerce was specifically raised and constituted one of the important issues before the lower Court. The geographical location of points on the border of the state is analogous to the situation in Minnesota.

In regard to the issue of interference with interstate commerce the Court made an able analysis of various leading cases. His comments upon *Missouri Pac. Ry. Co. v. Kansas,* 216 U. S. 262, are especially pertinent to the pending Minnesota cases. He said in part:

> "Now, when it is recalled that one of the claims made here is that the reduction of the local rates between points on the south side of the Ohio River (like Louisville, Covington, and Newport) and Bardstown will for business or economic reasons necessitate a corresponding reduction of the Jeffersonville and Cincinnati rates to Bardstown, not to speak of points north of those cities, it is hard to distinguish such a claim from that urged by the railroad company in the Kansas case in regard to the absence of terminal facilities at the state line and the consequent necessity to operate 20 miles further, to Butler. This latter claim was based alone upon a business or economic reason, but the answer of the Chief Justice was that this 'would be at the mere election of the corporation.' This answer is equally applicable to the complaint made here. This right of election signifies choice between alternatives, in the sense that either or any one of them may be rightfully selected. The choice is to be exercised by the company. It follows that the burden on interstate rates complained of here is one that may or may not be assumed by the company, according to its financial interests. It does not follow that its averment of a present intent to assume the burden will practically be either a necessary or wise choice of alternatives, much less that the company will continue to carry the burden. The important point, however, is that the Supreme Court has declared that such a burden is not in its effect direct."

In *Oregon River & Navigation Co. v. Campbell,* 173 Fed. 957, (involving certain class rates from Portland to points in Oregon, established by the state commission), the issue of interference with interstate commerce constituted one of the important questions decided by the Court. On this question the Court found that, as a matter of law, there was no invasion or interference with interstate commerce; and the single question became whether the natural operation of the orders of the Oregon Commission did make such an invasion. The carriers, as in practically all of these cases since the *Granger cases,* claimed that the state rates interfered with interstate rates. The carriers also maintained that freight traffic moving to Tacoma, destined to points inside of the State, was charged the rates provided in Tariff L-525, filed with the Interstate Commerce Commission as required by the Interstate Commerce Act; while if the orders of the Commission were sustained, such interstate rates would have to be altered; and, instead of the rates fixed by L-525, those established by the Commission would have to be adopted. Upon this proposition the Court held as follows:

> "If it be that the local state rates, as fixed and regulated by the State Railroad Commission on these commodities, unsettle in some way previously fixed transcontinental or interstate rates, that circumstance does not render the state rates invalid as an interference with interstate commerce. Let it be supposed that the state was the precursor in making rates for the transportation of purely intrastate commerce, there could, then, at that juncture, be no conflict. Could it be contended that the state rate was invalid, because connecting railroads might desire to establish a trans-continental rate in combination with a local rate, also of their own making, which would conflict with the state rate? If so, the fixing of a state rate would be a precarious and evanescent thing, to be dissipated at the caprice of the transportation companies, and the general government would usurp, in practical effect, the functions of the state government in the regulation of intrastate commerce. Such was not the purpose of the framers of the federal constitution. Nor was it the purpose of Congress itself in the adoption of the interstate commerce act, wherein was recognized, as has been

noted before, the right of the state to regulate commerce wholly within its borders." *Oregon, etc., v. Campbell, supra,* at page 985.

In the later decision of *Southern Pac. Co. v. Campbell,* 189 Fed. 182, rendered July 3, 1911, (involving certain intrastate class rates on the Southern Pacific), one of the points involved was stated to be: the order of the state commission in question is violative of the Constitution of the United States, because it directly and materially affects interstate commerce, since the rate on interstate traffic over complainant's lines in Oregon is made up of the through rate to Portland with the local rate out. The court, after reciting a large part of the discussion that had been directed to the contention that the order, sought to be enjoined, affects interstate commerce, said: "*Both of these questions were considered and decided by this court in the Campbell case,* 173 Federal Reporter 957. The opinion of Judge Wolverton, in that case, contains such exhaustive, satisfactory and full discussion of the subject as to leave nothing to be added. I fully concur in his views and am unable to distinguish this case, in principle, from the one decided by him."

A subject worthy of very serious consideration concerning these issues is found in the following extract from the report of Special Master W. S. Thorington, sitting in the Central of Georgia and Western Railway of Alabama rate hearings:

> "If experience has sufficiently demonstrated the wisdom or necessity of confiding in its entirety the matter of rate regulation to Congress because it can be more reasonably and justly done by one regulating body, it would seem that the proper way to lodge such a power of such vast importance in Congress is by a constitutional amendment adopted by constitutional methods and in which the power shall be so defined and hedged about as that the interests of the several States shall be safeguarded to the greatest extent without making the power of Congress ineffective. Besides an entire absence of power in the courts to invest Congress by construction with such sweeping control of rate regulation, to the entire exclusion of the states from the regulation of their domestic affairs, in this respect, the result of such judicial construction would

be to place the power in Congress without any defined limitations or restrictions."

In *Woodside v. Tonopah & G. R. Co.*, also *Southern Pacific v. Railroad Commission of Nevada*, 184 Fed. 358, on page 360, the following specific statement of the issue and decision, on the particular question under discussion, is made:

> "It is charged that, if the rates fixed by the railroad commissioners for the state of Nevada is enforced, it will make an unlawful discrimination with respect to the products transported from Truckee, Loyalton, and Fulda, in California, to Tonopah and Goldfield, in Nevada, as compared with the rates from Verdi, in Nevada, to Tonopah and Goldfield, in Nevada. That is the main feature of the Southern Pacific case, that it interferes with interstate commerce. Ultimately this charge resolves itself into a constitutional question, whether the order of the railroad commissioners is an interference with the exclusive power of Congress to regulate commerce among the several states. The present rate for transporting forest products from points in California to points in Nevada has been fixed by the railroads and not by the authority of the Interstate Commerce Commission. The order of the Railroad Commission does not, therefore, interfere with any authority of the federal government to regulate commerce between the several states; that authority not having been expressed or declared. **A rate fixed by a state railroad commission for intrastate traffic, if just and reasonable in and of itself, cannot be held to be unlawful and discriminatory because it may conflict with some rate fixed by the railroad company for interstate traffic. Upon adjustment the latter rate must yield.** This we think is a complete answer to the allegations of the bill in the Southern Pacific Case."

Judge McPherson in the Missouri Rate Cases (*St Louis & S. F. R. v. Hadley*, 168 Fed. 317, 343, 344), gives an extended discussion concerning the issue of interference with interstate commerce; this also constituted one of the most important questions in the Missouri cases. His conclusion, like those of all the other Courts whom we have cited, was contrary to the decision reached by Judge Sanborn. He stated that counsel for the Railway Companies insist and urge (though not in

terms) that the laws of political economy, custom and convenience shall act as a substitute for Missouri statutes and the decrees of the Missouri Supreme Court. If they were, he suggests that the inevitable result would be that Maine would have the power to fix intrastate rates while Missouri could not use such power because of her location between the two rivers, which the railways have adopted as basing points in the framing of their interstate tariffs. He said it might be well to have one national supervising body, but challenges attention to an important phase of that proposition, in the following language:

> "It may or may not be true that it would be for the better to have all the interstate railways of the country, doing both a state and an interstate business, under one supervising authority, such as a commission, regulating both classes of business. But under the commerce clause can this be done? *Employers' Liability Cases*, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297; *Wabash R. R. v. U. S.*, (C. C. A., 7th Circuit), 168 Fed. 1; 9 Columbia Law Review, 38; *U. S. v. Colorado, etc., R. R. Co.* (8th Circuit), 157 Fed. 321, 85 C. C. A. 27, 15 L. R. A. (N. S.) 167." (id. 344.)

In a brief review of these cases, the concluding passage of Judge Smith McPherson's discussion upon this issue is worthy of a place; he stated:

> "Difficult as these problems are, they can and will be solved, and for the right.....It is not true, as some say, that each state can lower the rates to confiscation, as all know who have read the decisions to any purpose. I believe as firmly as does anyone in the power and the rights of our general government, and, when the clashings come as to the power of the state and the general government, let the doubts be solved in favor of the government. But as to some matters there are no doubts, and two of these are that the Constitution is the supreme law of the land, and that as to all local matters the states are in control. All should insist upon both." (id. 344.)

In the opinion rendered in the United States Circuit Court for the Central Division of the Southern District of Iowa on the 16th day of September, 1911, in what are known as the

Iowa Express Cases (not yet reported) the same question of interference with interstate commerce on the part of the state of Iowa by its intrastate express rates was raised, and upon that subject Judge McPherson took occasion to specifically refer to the conclusions reached by the Court in the Minnesota cases in the following language:

> "I am aware that Judge Sanborn, Circuit Judge in the cases known as the Minnesota Rate Cases (*Shepherd v. Railroad*, 184 Fed. 765) has held otherwise. The state of Minnesota, by reason of certain geographical phases, presents this question in a strong way, and somewhat differently from the phase of the question as presented in the Missouri cases. But in principle, I can see no difference between the Minnesota and Missouri situation. Recognizing, as I do, that his opinion is clear and strong, I cannot bring my mind to the conclusion that he adopted, and still adhere to my views as expressed in the Missouri Cases."

In these Express Cases the issue of interference with interstate commerce was again urged by the carriers and again denied by the Court.

The exclusive jurisdiction of the states over rates on transportation moving wholly within their boundaries, has been the law for a generation, it was early recognized in the *Granger Cases*, again clearly approved in the *Railroad Commission Cases*, in *Smyth v. Ames*, and all other decisions of this Court upon that issue; it is a settled doctrine of the law. The doctrine announced by Judge Sanborn is contrary to the Constitution, contrary to all the interpretations of this Court upon that provision of the Constitution here under consideration, and contrary to practically all the decisions of the lower federal Courts since his opinion was rendered.

THE REASON OF THE RULE, IN SUPPORT OF THE FEDERAL PLAN, OR DUAL FORM OF GOVERNMENT REGULATION, WHICH WE HAVE ADOPTED IN THE UNITED STATES.

States' rights, as supported by an almost uninterrupted line of decisions, *and the wisdom of the plan,* are two distinct factors which must be reckoned with in a consideration of fundamental issues of the character now before the Court. If the reason of a rule, handed down by our fathers, is gradually passing away, there is a marked tendency on the part of those who interpret and administer the law, to remold and transform the rules of those other days into harmony with the demands of modern times. Though many courts, and those learned in the law, would probably denounce such a statement as confusing the functions of the legislature with the judiciary, yet this is a fact, a circumstance, which must be reckoned with. The reason of the rule compels consideration.

Today, a national propaganda has been carried on to support a change in the trend of our judicial decisions. These efforts have been heralded by some as those of true statesmen, looking to the development of a new nationalism. In view of the fact that this situation does exist, it would seem to be our duty at this time not only to consider the language of statutes and the decisions of this Court in the past, but to briefly review the reason of the law involved; for, after all, our law is based on reason as well as upon precedents.

In discussing a few of the issues of this character, we are abundantly justified by the precedent set by our worthy opponents before the lower court, at which time they dwelt at great length upon the demands of commerce, the plans and purposes at the time of the organization of our federal government, and various other matters of a kindred nature, which all go to the foundation for the rule in reason.

The adoption of the Sanborn doctrine, that a disturbance in competitive rates constitutes an interference with interstate commerce, will eliminate the state regulation of rates, because of modern competitive conditions. The dual system of govern-

ment regulation, in force today in the United States, is the real object of attack by the railroads in these cases.

Shall we proceed as rapidly as possible to eliminate state government in our commercial life?

You may start with this premise: Within the next twenty-five years substantially all our commercial affairs will be carried on by companies doing an interstate business. What is well for railroads will be good for others. Shall we abandon our state governments, so far as the regulation of business is concerned? Here is an issue which strikes at fundamentals, which has to do with *the method of government.* In striving after the new, we frequently fail to realize the intrinsic value of the old.

We can merely suggest a few of the reasons justifying this federal plan or dual form of regulation which contemplates both a centralized governing power and also state regulation.

It is true that our constitution in many respects was a compromise, the creation of circumstances. The different colonies were loath to yield up any of their powers. Hamilton fought vigorously for a strong national government. In those days much fear prevailed that we might have too loose a central government. Statesmen of that and succeeding periods were profoundly concerned over this problem. Marshall, on the Supreme Bench, became the chief instrument in cementing the national character of our government.

However, it is a gross mistake to imagine that the jealousy among rival states was the sole cause for limiting the powers of the central government. There existed among the framers of our constitution, entirely independent of any compromise as to the rights of rival states, a deep seated conviction that a federal government composed of several states retaining large jurisdiction, was far preferable to a strong centralized government. This is evidenced by the recorded discussions of that day. Here was a question, not of states' rights, but of expediency, of wisdom. This purpose or intent in their minds was reflected in the constitution which was drafted.

One whose writings inspired much of the thought of that time was Rousseau; his "Contrat Social" became a standard text book for the makers of government of those days. In that work Rousseau stated: "As nature has set limits to the stature of a properly formed man, outside which it produces only giants and dwarfs; so likewise, with regard to the best constitution of a state, there are limits to its possible extent so that it may be neither too great to enable it to be well governed, nor too small to enable it to maintain itself singlehanded. There is in every body politic a maximum of force which it cannot exceed, and which is often diminished as the state is aggrandized. The more the social bond is extended, the more it is weakened; and, in general, a small state is proportionally stronger than a large one.

"A thousand reasons demonstrate the truth of this maxim. In the first place, administration becomes more difficult at great distances, as a weight becomes heavier at the end of a longer lever.....The same laws cannot be suitable to so many different provinces, which have different customs and different climates, and cannot tolerate the same form of government.....The chiefs, overwhelmed with business, see nothing themselves; clerks rule the state. In a word, the measures that must be taken to maintain the general authority, which so many officers at a distance wish to evade or impose upon, absorb all the public attention; no regard for the welfare of the people remains, and scarcely any for their defense in time of need; and thus a body too huge for its constitution sinks and perishes, crushed by its own weight."

There is much truth well stated in the foregoing sentences, but it is evident that Rousseau had not realized the full possibilities of the federal plan of government, as worked out in America, whereby the advantages of intelligent, efficient, local home rule and the large empire, compelling respect, are combined into one whole. It is this combination, this federated cooperative plan which is the distinguishing feature of the American Constitution.

From the earliest records we learn that men have always been seeking for some form of government which would come close to the life and thought of the average man, which would keep in close touch with the progress of business and social life, and at the same time be large and strong enough to keep peace. Powerful centralized governments have been common. There seems to be an inevitable tendency for a government either to fall to pieces, or to gravitate into a strong centralized domineering power. The delicate balance between the central and local authority created in America was a novelty amongst the nations, up to the beginning of the Nineteenth century. This was not the fruition of any one man's reasoning, but largely the result of circumstances; however, a most happy result which has surpassed the expectations of those who conceived the plan. The builders wrought better than they knew. For many years our government was referred to among political circles in Europe as "The great American experiment." When the success of this novelty in state craft became assured, the basic features of the plan were followed by other countries. England has been forced to abandon the strong centralized form of government for her large empire, and to substitute the federal principle in most of her colonies. Germany and other nations have followed the example.

Now, in its heyday of prosperity, when its success has been proven and is acknowledged on all sides, it is proposed to gradually destroy the chief feature of the American plan. *That which renders the United States unique in history is the organization of a vast empire in territory and population, so as to preserve the largest possible home rule to the various parts of the nation. In the name of a new nationalism it is now proposed to eliminate this basic characteristic of our government.*

The fact is that men of the Eighteenth century clearly anticipated just such situations as are here presented in the decision of Judge Sanborn, a federal court attempting to take away powers from the several states, powers which were undoubtedly intended at the beginning, and which have been

thoroughly established, exercised by many states, and recognized by all courts for a generation. Jefferson's autobiography contains the following remarkable passage:

> "I deem it indispensable to the continuance of this government that they (our judges) should be submitted to some practical and impartial control; and that this to be imparted, must be compounded of a mixture of State and Federal authorities.
>
> "It is not enough that honest men are appointed judges. All know the influence of interest on the mind of man, and how unconsciously his judgment is warped by that influence. To this bias add that of the *esprit de corps*, of their peculiar maxim and creed, that 'it is the office of a good judge to enlarge his jurisdiction,' and the absence of responsibility; and how much can we expect in impartial decision between the General Government, of which they are themselves so eminent a part, and an individual state, from which they have nothing to hope or fear? We have seen, too, that, contrary to all correct example, they are in the habit of going out of the question before them, to throw an anchor ahead, and grapple further hold for future advances of power. They are then, in fact, the corps of sappers and miners, steadily working to undermine the independent rights of the states, and to consolidate all power in the hands of that government in which they have so important a freehold estate. But it is not by the consolidation or concentration of powers, but by their distribution, that good government is effected. Were not this great country already divided into states, that division must be made, that each might do for itself what governs itself directly, and what it can so much better do than a distant authority." (Extract from the Autobiography of Thomas Jefferson, page 81, of Vol. 1, of the writings of Thomas Jefferson, published by Taylor & Maury, Washington, D. C., 1853.)

Mr. Jefferson in his first inaugural address summarized what he termed "the essential principles of our government," and amongst the first of these he placed: "the support of the state governments in all their rights as the most competent administrations for our domestic concerns and the surest bulwarks against anti-republican tendencies."

If the national government is permitted to gradually ab-absorb those functions formerly exercised by the states, it will only be a question of time until some great evil will demand some great remedy. Agitation will follow agitation. There will be no opportunity to try out the new proposal, the nation as a whole must adopt it or reject it. Those will be trying times, when the foresight of the best of us will differ and the future of this American system will be at stake.

It would be wise for us to weigh well the advantages of that which we have, before exchanging it for that which we have not.

We believe the federal plan, as conceived by our fathers, is better than the new nationalism. We believe the states are a distinct factor in our scheme of government. There is a function for the national government to exercise, and there is a sphere for the state. This federal plan is a sort of safety valve against political and industrial revolution, and it is the greatest ever devised by the makers of government. New ideas are tried out in a few states before they are adopted in others or by the nation.

Every important advance step in the regulation of railroads, corporations, and the great consolidations of our generation, has originated with the states.

The first legislative acts to regulate the business of our railway companies were passed by a few western states. This occurred about the year 1873, fourteen years before the federal government ever took a similar step.

Many states provided for commissions with full power to fix maximum rates, during and prior to the year 1887. It was not until 19 years later, that the federal government gave the Interstate Commerce Commission actual power to fix maximum rates.

It was in the 90's that this Court stated the fair value of the properties devoted to the public service should be the basis for all computations relative to reasonable rates, and it

was in the 90's that one of the states made a valuation of her railway properties. Since then, a dozen different states have taken similar action. It has now been more than a decade since the Interstate Commerce Commission first asked Congress for facilities to make a valuation of railway properties in this country. Year after year they have petitioned for this, and their efforts have been entirely in vain.

Each important step of progress along these lines has been initiated in the states. No one, except the ignorant or he who is not in his right mind, will claim that we have solved these problems concerning the regulation of railroads. We are only at the threshold of this subject, pioneers along the edges. Now, at this stage, is it wise to cut off that which experience has demonstrated to be the principal source of advancement?

There is a natural reason why the states have always acted first and will continue to do so in the future. It is easier for a group of men of moderate means, realizing the value and force of a new line of action on the part of the state, to succeed in persuading a state to take that step. In order to persuade the nation to do the same thing, it takes many years of hard work, and large sums of money; indeed, it is doubtful if the nation would ever have taken many of these steps for generations to come, had it not been because they proved practical and effective when tried in the different states. As one state after another finds the action of her neighboring Commonwealth to be wise and good, they follow her lead, and adopted similar provisions. In this way, progress or reform is gradually brought about in the nation, as a whole. The states form a sort of experiment station, and where they have gone wrong the courts are quick to check them, or there is developed a tremendous public sentiment in the country as a whole, which quietly destroys that which is not wise. And it is no reflection on state commissions that they should have been reversed occasionally; they have been blazing the way.

In the matter of the regulation of rates, these carriers can have little to complain about as to the different states. The records show that the Interstate Commerce Commission has gone wrong as often as any state government, and where the mistakes have been made by state commissions, the companies have had ready access to federal courts; so long as this continues, the railroad companies have nothing to fear. Upon the other hand, they have much to hope for, if they can succeed in destroying the state regulation of rates.

In view of the remarkable history of the origin of these movements, which has been briefly sketched above, it is little wonder that the carriers are extremely solicitous in their efforts to prevent and to remove the possibility of further advance steps in the different states.

This novelty in state-craft, this federal government of ours, which combines the strong central government with local self government, into one whole, has some elements of value and strength never dreamed of, perhaps, by those who worked out the details in the latter years of the 18th century. It is precisely this local self government which keeps regulation close down to the needs and demands of different localities and different states.

Judge Sanborn has said that the railroad business is so complicated, state business is so closely interlaced with interstate business, and the details of the costs, rates, earnings, value, and the physical handling of the traffic, are so interwoven and connected together, that it is an impossibility to make any separation. Therefore, he concludes this business is of such a national character, that it requires a single national tribunal to regulate it.

An extract from the recent report of Special Master W. S. Thorington, sitting in the Central of Georgia and Western Railway of Alabama rate hearings, is in point. He stated:

> "The vice of such a claim consists in the assumption of the unity and inseparableness in all cases of the two classes of traffic.

"That such a separation is difficult or not possible with the exactness of mathematical certitude, is very generally admitted, but it would be a startling canon of construction that a state is to be deprived of a right so vital because of difficulties in the way of its exercise when such a principle has never been applied to individuals seeking to enforce ordinary rights in the courts."

One sentence will contain a complete answer to these claims of Judge Sanborn:

Even after you have removed the state lines, the problem of reasonable local rates still remains.

The longer the hauls, and the higher the rates, the better it is for the stockholders in railways companies. Upon the other hand, it is to the interest of the public generally to have short hauls as well as long hauls, and to have rates just as low as they can reasonably be placed, providing it does not seriously interfere with the prosperity and growth of the railway business. In order to tell whether local rates are reasonable or not, it will be necessary always to make some division between operating expenses, earnings and value. This will be true whether state governments or whether the national government has jurisdiction over these local hauls. The problem of the reasonable local haul in all its complexity would still be with us, even if you were able to destroy state regulation.

One of the grounds of attack relied upon by the carriers rests upon the theory that the rates imposed are a tax, and thereby indirectly affect the volume and prosperity of the entire business. It is a tax collected by private individuals or corporations permitted by the state to levy such tax.

The fundamental principles governing the exercise of taxation powers are applicable, in some degree, to the fixing of maximum rates. The State of Iowa collects taxes from its railroads amounting to a certain sum of money per mile of railway which is less than the tax in any neighboring state with only one exception. Now that might be interpreted as

working, in effect, a direct discrimination in favor of Iowa railroads, and against those in neighboring states. That, if carried far enough, might foster railroading in Iowa. But Iowa has the right to do this; and no man can prevent her from doing so. Iowa has the right to remove burdens and to compel others to do so, within certain well defined limits (she must not confiscate the property). That is her business; she can do this whether Illinois, and Kansas, and Minnesota do so, or not.

A burden such as a tax, or license, or extra fee, might be placed upon interstate commerce which would be unconstitutional.

But a removal of a burden from state commerce, uniform so far as the jurisdiction of the state goes, is not the same thing as placing a burden on interstate commerce, over which the state does not act. It is for the tribunal having jurisdiction over the interstate commerce to remove the burden resting upon it, if any such exists. To be unconstitutional, the regulation must be a direct burden upon interstate commerce. It would be just as reasonable to claim that a state is placing a burden on interstate commerce if it makes a tax on the sale of liquor, manufactured and shipped within the state, less than the tax imposed by other states. The reduction of the state tax may foster the state business to the sacrifice of the liquor business elsewhere, but that is wholly a matter of concern to the state. The state could build its own railroads if it wanted to, and haul goods at cost within the state and injure, to a certain extent, every point on the border of the state. That is the concern of the state. No man can deny this right so long as our present federal system of government prevails. *Railroad Co. v. Maryland,* 21 Wall. 457, 471.

Should it ever be proven in any given case that a state has reduced its interior rates with the deliberate purpose of injuring a neighboring state, then it will be ample time for the courts to interfere. The good faith of the state is an important consideration in the case at bar. No one has suggested the possibility of such a motive upon the part of Minnesota.

When such a case arises the courts will act, as was suggested, under other circumstances, when it could be shown that a city or state sought to reduce rates for sinister purposes, in order to lower values with the object of purchasing the plant. *San Diego Land & Town Co. v. Jasper,* 189 U. S. 439, 443; *Knoxville Water Co. v. Knoxville,* 189 U. S. 434, 438.

If the state has not the power to regulate its internal commerce by the making of rates, where is this power vested?

Clearly Congress cannot do it and if the doctrine of the Minnesota rate cases shall be sustained the state cannot do it.

There must be such a power lodged somewhere.

It required years of endurance and submission by the people—state and nation wide—to discriminations and railroad domination and even oppression before any legislation could be had, either state or national, and to secure such legislation, earnest and continued efforts were made for many years. The legislation enacted was assailed and from *the Granger Cases* down constant appeals have been made to the courts. With the long line of authorities, with amended and subsequent legislation, based upon experience and upon rules laid down by the courts, it seemed that the question affecting the domain in which Congress could and must act, and that in which the state could only act, had been fully settled, and the line of demarcation between the power of each had been clearly defined.

The policy and rules of law defining the power of national and state authorities were followed and all legislation adjusted and made to conform to the powers thus determined.

It is now proposed that the Federal Courts shall overrule the long established precedents and announce a new rule of law not found in the Constitution or the laws of Congress, not granted with the assent of any state, which takes away from the state the power of control of its domestic commerce, or to protect its people as against the common carriers therein.

If any compensation or relief could be granted there might be some possible justification, but there is none. It leaves the commerce of the state absolutely without control or regulation. Congress is without authority, the state would have no power.

The power of the state to regulate and control is too deep seated and firmly established as a necessary right to be removed by judicial interpretation, and announcement.

It must be expected that, from time to time, there will be strong men, men who are ambitious to leave distinguished names in history, who will champion a more powerful and centralized government in the United States. There always has been, and there always will be, a dramatic attraction in the building of great empires about a central authority; the glory of power in a supreme authority interests and awes even those who are governed.

The strength of nations does not lie in the vastness of the territory under one highly centralized and supreme authority. This truth has been centuries in the learning.

That government which hugs closest to the sober and mature judgment of the people, and keeps in touch with the demands of changing conditions, is the one which best fulfills its mission, and will live the longest. The makers of government must set as their goal not the creation of an extensive centralized machinery, but a human organism, capable of reaching out, searching after, and meeting the demands of life.

The state government is far closer to the local needs and demands of traffic conditions, than the national government.

This dual system of government we have, is here by virtue of our constitution. This is hardly the tribunal to consider the wisdom of our form of government. A change in this system is a matter of the gravest and most far-reaching character. It should be carefully weighed, and all sides of the question should be considered, then action should be taken. What tribunal should take that action? Is it the function of

Congress? No. Is it the function of this Court? Emphatically no. This is not a constitutional convention. Even though the theories of Mr. Holden and associates, who speak for the carriers, are entirely correct as to the wisdom of our dual system of regulation, let them present their arguments before the proper tribunal.

These words of Chief Justice White in the recent decision relative to the Oregon Initiative and Referendum law, are eminently appropriate to this case:

> "As the issues presented, in their very essence, are and have long since by this court been definitely determined to be political and governmental and embraced within the scope of the powers conferred upon congress and not therefore within the reach of the judicial power, it follows that the case presented is not within our jurisdiction."

The tremendous growth of interstate commerce seems to have raised the query amongst some of us as to whether separate state governments are longer needed. The wisdom of local self government and the federal system of state-craft is up for consideration. Judge Sanborn's decision strikes at the very vitals of our present system. He would not wait for the tedious prescribed methods of amending our constitution. We must have a care. This new method of amending the constitution by the decision of a judge, is dangerous to democratic institutions. It may be wise to abolish state governments so far as business is concerned. What is true of railroads is true of other business. It may be wise to destroy this federal scheme of government, but you must first prove that to be true; and even then we will not tolerate this method of making the change.

Even if the position taken by Mr. Holden and his associates, be wise, even if it be thought best to make this change, if that

be so, had we not better let the nation do it in a constitutional way? The Supreme Court is not the supreme legislature, and it is not a constitutional convention.

The railroads can reduce rates for the benefit of any given territory. The state has the same right up to a certain limit, and the Supreme Court and no other tribunal on earth can gainsay that right until our constitution is changed. The other parts of this brief will be devoted to a consideration of the question whether that limit has been exceeded by the Minnesota authorities.

Section 2. Interference with Interstate Commerce, as a Matter of Fact.

The lower Court admits that "The reduction of local rates does not interfere with interstate rates 'as a matter of law.'" (Nor. Pac. Rec. Vol. 1, 412.)

If there is no interference as a matter of law, there can be no interference as a matter of fact, of which this Court will take cognizance. However, we will consider the alleged facts discussed by the lower Court.

Judge Sanborn bases his conclusions upon the findings of facts made by Special Master Otis. We will review these findings, first under the caption: *"A. Examination of the Master's Findings in Detail;"* and second, under the heading: *"B. An analysis of the Basic Principles relied upon by Judge Sanborn, and their application to the facts in these cases."* Under the first heading we will examine the Master's Findings, item by item. There are three or four basic principles running all through the twenty-nine subdivisions of the findings by the Master. Under the second heading we will undertake a careful analysis of these basic doctrines.

A. EXAMINATION OF THE MASTER'S FINDINGS IN DETAIL.

The lower court adopted in its entirety the findings of facts made by Special Master Otis. We will make a somewhat detailed examination of these facts as described by the Master.

The Master stated in his report to the Court, (Nor. Pac. Rec. Vol. 1, p. 198):

> "In the case before the Master the validity of the prescribed rates is directly in question, not merely as a matter of legal construction, but upon voluminous evidence, with all interested parties present, and the force and effect of the federal act and the commerce clause can be determined in the light of the facts disclosed by such evidence."

The Master proceeds to divide these so-called facts into twenty-nine subdivisions. For the sake of convenience we will analyze these subdivisions item by item.

Subdivisions 1, 2, 3, and 4. The Master in these four subdivisions describes the mileage of the railways, and states that they are doing both interstate and intrastate business. There is no contention as to this.

Subdivision 5. This subdivision claims that "the larger proportion of the business of such companies within the state of Minnesota is interstate." This statement must be modified as to passenger business, 67.21 per cent of which, on the Northern Pacific, and 49.2 per cent on the Great Northern is intrastate.

Subdivision 6. Claims "Conditions attending transportation of passengers, of merchandise.....of commodities covered by chapter 232 have been and they still are substantially the same for like distances.....in Wisconsin, Minnesota, North and South Dakota on complainant's lines of railroad."

This to our minds is one of the most important points presented in the Master's report, and if it is shown that he has based his final conclusion on a wrong assumption of facts, then his findings must fall. Let us first see on what he has based his conclusion that conditions attending transportation are substantially the same on complainant's lines of railway in Minnesota, as on their lines in Wisconsin, North Dakota and South Dakota. The Master refers to the testimony of Mr. Baird, which for convenience we will quote here. (Nor. Pac. Rec. 1436):

> "Q. From what stations are substantial quantities of grain shipped on the Northern Pacific? I am confining my inquiries, at present, to the eastern portion of the system.
>
> A. From practically all of the stations in the territory described.

Q. And to what points of destination is grain in general shipped?

A. To Minneapolis, Duluth and Superior.

* * * * * * * * * *

Q. Where do the shipments of coal on the eastern end of your system originate in general?

A. At Duluth, Minnesota, and Superior, Wisconsin.

Q. To what points on the eastern end of your system are those shipments destined?

A. The distribution of the coal from those points is general throughout all of the territory east of about Jamestown, North Dakota.

Q. Does that apply to both hard and soft coal?

A. Yes, sir; but more particularly to the hard coal.

Q. What different conditions, as regards transportation, exist as between the various points of destination of this coal?

A. There are no different conditions.

Q. Whether the points of destination be in Minnesota or in North Dakota?

A. No, sir."

* * * * * * * * * *

Speaking of lumber, Mr. Baird says:

"Q. What is the principal point of shipment among those that you have named?

A. There is probably more shipped from Cloquet and Little Falls than from any other point.

Q. Where is that lumber carried by the Northern Pacific?

A. It is distributed through the agricultural section in Minnesota and North Dakota, except that there is a large portion of it which cannot be marketed in that section and is sent east via Duluth or Minnesota Transfer.

Q. Is any of it distributed into Wisconsin?

A. A comparatively small portion of it any way."

* * * * * * * * * *

"Q. Where do shipments of live stock on the eastern end of your system originate?

A. At practically all of the stations west of Minneapolis and Duluth, in Minnesota, North Dakota and Eastern Montana.

Q. Where is that live stock carried in general?

A. Principally to South St. Paul and Chicago.

Q. The Northern Pacific brings it to the Minnesota Transfer?

A. To the Minnesota Transfer or St. Paul."

* * * * * * * * *

"Q. What are the principal points of origin of shipments of merchandise on the eastern end of your system and destined for delivery in Minnesota, North Dakota and Montana?

A. The principal points of origin are Duluth, Superior, St. Paul, Minneapolis and the Minnesota Transfer.

Q. I am speaking now of the merchandise covered by the order of the Commission under date of September 6, 1906, rates prescribed by which are complained of in the bill of complaint. That is your understanding, is it?

A. Yes, sir.

Q. To what points of destination does this merchandise move?

A. To all points in Minnesota and North Dakota.

Q. And Montana?

A. And Montana and beyond; west of our eastern terminals."

If the above testimony proves anything at all, it proves that conditions, especially as to transportation, must of necessity be materially different in Minnesota than they are in North Dakota. Mr. Baird tells us that practically all of the grain from North Dakota goes to Minneapolis, Duluth and Superior; that the coal into North Dakota comes from Duluth, Superior and Minneapolis; that lumber into North Dakota largely comes from Cloquet and Little Falls, Minnesota; that all the live stock from North Dakota stations goes to South St. Paul and Chicago; that the principal points of origin of shipments of merchandise to stations in North Dakota originate at Duluth, Superior, St. Paul, Minneapolis and

Minnesota Transfer. Could any testimony have been offered which would more clearly show that conditions of transportation in North Dakota could not be the same as in Minnesota? The mere fact that all of the above mentioned commodities must pass through Minnesota before reaching North Dakota, should have caused the Master to carefully examine the record before he so confidently reported to the Court that conditions were the same.

The figures given on page 115 conclusively show that conditions are materially different in Minnesota. From the said figures it is clear that Mr. Baird for the Northern Pacific, and Mr. Maguire for the Great Northern, did not take into account the great difference in the volume of traffic in the state of Minnesota as compared to the balance of their respective systems outside of that state, when they testified that conditions were substantially the same in these other states as in Minnesota. The figures also show that the Master did not examine into this matter before he made his findings to the Court.

The "relative fair basis" mentioned in subdivision 6 will be treated under a succeeding item.

Subdivision 7. In this subdivision the Master finds that Superior, Wisconsin, and Duluth, Minnesota, Grand Forks, North Dakota, and East Grand Forks, Minnesota, Fargo, North Dakota, and Moorhead, Minnesota, Wahpeton, North Dakota, and Breckenridge, Minnesota, are each closely related jobbing points, separated only by a state line formed by a river running between each couple of the above named cities, and further finds that if different rates are named to either of the above named twin cities, and not allowed to the other, the same would constitute undue and unjust disadvantage as between them.

In Nor. Pac. Vol. 1, page 196, the Master says:

> "Here the complainants do not claim that 'as a matter of law' local rates necessarily interfere with interstate commerce rates.....What they do insist is that the evi-

dence presented in these cases differentiates them from the Ames case."

If the above named twin cities cited by the Master are to be understood as presenting the question of interstate interference by the state rates, as being different from the same question as presented in the Ames case, then his findings must fall, for in the Ames case it was strenuously urged by the railroad witnesses that on account of Council Bluffs, Iowa, being located but a few miles from Omaha, Nebraska, and separated only by the Missouri River, the same rates must be named from both points, and for that reason the Nebraska statute interfered with interstate commerce.

In the Minnesota case it is claimed that the question is presented in a different form on account of these so-called twin cities being located on the western as well as the eastern border of the state. As a matter of fact, there is no difference between the two cases in this regard. In the Ames case it was shown that the Nebraska statute interfered with interstate rates on traffic shipped to Council Bluffs, Iowa, from Nebraska stations.

Mr. Utt, witness for the railroads, testified in the Ames case, and showed how the Nebraska statute would interfere with rates carried from and to points in Wyoming and Colorado from and to Missouri River points, evidently meaning Omaha, Nebraska, and Council Bluffs, Iowa.

The Court's attention is called to the fact that the Master does not undertake to point out in what regard he considers the Minnesota case different from the Ames case in the matter of this "twin city" interstate commerce interference. On almost every page of this part of his findings, treating on this question, he speaks of this interference as though the question was presented in a materially different form.

The Missouri River is now, and has been for a great many years, used by the railroads operating in the country west of the Mississippi River, as a basing line on which to build their rates to stations west of the Missouri River in Nebraska, South Dakota, Kansas, Colorado and Wyoming. This is uni-

versally true with regard to all shipments moved on the Western Classification and class rate application. Let us illustrate this point: The first class rate from Mississippi River points to Missouri River points is 60 cents per hundredweight (short line distance 280 miles). The rate from Missouri River points located on the eastern border of Nebraska to Hastings, Nebraska, is 51 cents per hundredweight (short line distance 152 miles). The through rate from Mississippi River points to Hastings is 111 cents per hundredweight. The earnings from the haul, Mississippi River to Missouri River, is 42.8 mills per ton per mile, the earnings Missouri River to Hastings 67.2 mills per ton per mile, and the earnings Mississippi River to Hastings on a through shipment is 51.4 mills per ton per mile. This illustration clearly shows how the basing of rates on the Missouri River affects traffic when billed through from Mississippi River points to points west of the Missouri River in the states above mentioned, and in this regard makes the interference with interstate commerce in the Ames case precisely the same as in the case at bar.

Superior, Wisconsin, and Duluth, Minnesota, are located in almost exactly the same position as Omaha, Nebraska, and Council Bluffs, Iowa, in that these two cities are used by the railroads serving Minnesota as basing points from and to which through rates from points east thereof are made up. Minneapolis and St. Paul are also used by the carriers as basing points from and to all the territory west, so far as the so-called merchandise rates are concerned.

Nor. Pac. Rec. Vol. 1, page 195, quoting from the opinion of Mr. Justice Brewer, in the Ames case:

> "Railroad companies cannot plead their own convenience or the effect of competition between themselves and other companies in the restraint of the otherwise undeniable power of the state."

Is it not reasonable to suppose that the learned Judge had in mind, when he wrote the opinion in the Ames case and used the language, "cannot plead their own convenience," this very question of basing lines, such as the Missouri River

on the eastern border of Nebraska? And if this is true, why is not the same question presented in the Minnesota case in that St. Paul, Minneapolis and Duluth, Minnesota, and Superior, Wisconsin, are basing points, and thereby used as a convenience by the railroad companies in making up their rates to the territory west in Minnesota and North Dakota, and, in fact, through to Pacific coast points?

The so-called twin cities located on the western border of Minnesota and the eastern border of North Dakota, are different from the cities of Duluth, Superior, Minneapolis and St. Paul, in that they are not used as basing points from which rates are made to the territory lying west of Minnesota. The first class rate from Chicago to a point in North Dakota is made up of the sum of the locals, Chicago to St. Paul or Duluth, plus the rate from these cities to destination, and is made without any regard to the so-called twin cities located on the Red River in Minnesota and North Dakota.

Complainants in this case appear to claim that because there is a basing line on the eastern border of Minnesota, and none on the western line of that state, they have a right to differentiate between rates of progression that shall be charged to stations immediately west of the basing line stations, (such as Duluth, St. Paul and Minneapolis, on shipments originating in eastern territory, Milwaukee, Chicago and beyond), and stations west of the North Dakota and Minnesota state line. By this we mean that complainants claim, and the Judge concludes, that the rates to stations in Minnesota west of Duluth, St. Paul and Minneapolis from eastern territory can be made up on the sum of the locals on those basing line stations, even though the rate of progression per ton per mile may be 100 per cent more for the haul west of Duluth, St. Paul and Minneapolis to the Minnesota destinating stations, than it is for the haul up to these rate basing stations. Rates so made do not constitute unjust and undue discrimination, but when this same rate of progression basis is applied to stations in North Dakota on traffic originating in Minnesota, "then in that case undue and unjust discrimination does in fact exist."

The first class rate from Chicago to St. Paul, as shown by the testimony, is 60 cents per hundredweight, short line distance 410 miles, earnings per ton per mile 29.2 mills. The rate from St. Paul to Coon Creek on the Northern Pacific, located ten miles west, first class, would be 12 cents per hundredweight, earnings per ton per mile, 240 mills. The through rate from Chicago to Coon Creek would be 72 cents per hundredweight, distance hauled 420 miles, earnings per ton per mile 34.3 mills.

Complainants appear to think that it is all right not to apply continuous mileage from Chicago to a station ten miles west of St. Paul and Minneapolis (by "continuous mileage" is meant the same ratio of haul for the ten miles west of St. Paul as charged for the last ten miles east of St. Paul; in any event it should not be higher) but when this same question is presented at the western border of Minnesota they claim that this is unjust discrimination which is unlawful under the act to regulate interstate commerce.

A large amount of testimony has been presented by the complainants to show that the rates promulgated by the Minnesota Railroad and Warehouse Commission would cause them to unlawfully discriminate against towns located in North Dakota because the rates would have to be adjusted on a higher relative basis per mile after the Minnesota-North Dakota line was passed, claiming that there cannot be such adjustment of rates without causing unlawful discrimination under the federal commerce clause. Mr. Baird testified in this regard as follows (Nor. Pac. Rec. page 1480):

> Q. In the absence of competitive conditions which may depress a rate at certain localities, what justification in your opinion exists in rate making for increasing the rate per mile of haul with increasing distance?
>
> A. I do not think that there is any justification.

As shown above, this rule is not applied in making rates to points in Minnesota from the east on the Northern Pacific. This point can be further illustrated by reference to complainant's exhibit No. 43 (Baird). This exhibit shows that

the rate on lumber from Tacoma to Hellgate, Montana, is 35 cents per hundredweight. Hellgate, according to this exhibit, is 700 miles from Tacoma. The same rate of 35 cents per hundredweight is carried for the next 500 miles up to Terry, Montana, where the state line between Montana and North Dakota is reached, and the exhibit shows that the rate for the next fifty miles is increased 5 cents per hundredweight, making the rate to Waldon, North Dakota, 40 cents.

This means that the Northern Pacific Railway Company receives 20 mills per ton per mile for the last 50 mile haul of a shipment from Pacific coast points to Waldon, North Dakota, while they receive 5.82 mills per ton per mile for the haul up to Terry, Montana. Again, on the same exhibit they charge 40 cents per hundredweight on shipments from Tacoma to Fargo, North Dakota, a station located 400 miles east of Waldon, there being no added charge for hauling this last 400 miles. Again, the state line is reached between North Dakota and Minnesota and in the next 100 miles we find they have advanced their rate 5 cents per hundredweight, making the haul for this last 400 miles 10 mills per ton per mile, while they have received but 4.85 mills per ton per mile for making the haul from Pacific coast points up to the North Dakota-Minnesota state line.

Mr. Baird evidently did not offer this exhibit in order to bear out his statement quoted above. If there can be unequal breaks in a continuous mileage rate on the eastern border of Minnesota, and in the lumber rates from the west without the Northern Pacific company discriminating against stations so affected, how can they successfully claim that the same rule cannot be applied to stations immediately west of the Minnesota and North Dakota state line in North Dakota without creating "undue and unjust discrimination", as found by the Master?

Subdivision 8. In this subdivision the Master finds that on a specific date these complainant companies reduced their interstate rates from Superior, Wisconsin, to Minnesota points to the same rates that were made by them from Duluth,

Minnesota, and finds that because this was done "these reductions were compelled by the necessary and direct effect of the operation of the order."

This is the same question that was presented to this Court in the Ames case; Omaha, Nebraska, and Council Bluffs, Iowa, occupying in that case the same geographical location with reference to interference with interstate commerce as Duluth, Minnesota, and Superior, Wisconsin, do in the case at bar. Surely the words in Mr. Justice Brewer's opinion, rendered in the Ames case and afterwards affirmed by this honorable Court, apply to the Minnesota case as completely as they did to the Nebraska case. He said:

> "It is true the companies may, for their own convenience to secure business, or for any other reason, rearrange their interstate rates and make them conform to the local rates prescribed by the statute, but surely there is no legal compulsion." *Ames v. Union Pac.*, 64 Fed. 172.

Subdivision 9. In this subdivision the Master finds that the railroads serving the states of Minnesota and North Dakota have found it to their own convenience to equalize the freight rates between the so-called "jobbing centers," such as St. Paul, Minneapolis, Duluth and Moorhead, Minnesota, Fargo and Bismarck, North Dakota, Billings and Butte, Montana. He also finds that the order of September 6, 1906, as supplemented by the order of May 3, 1907, issued by the Railroad and Warehouse Commission of Minnesota, made a change in this convenient arrangement of freight rates as between some of the cities named above, and because of this disarrangement unjust and undue discrimination is caused, and for this reason the orders above mentioned, as well as the statute of the state of Minnesota, must be declared unconstitutional.

Can it possibly be that intrastate rates, which have been found to be reasonable by a competent body organized by the state and charged with the duty of getting all of the facts, should be declared unconstitutional because they make a change in the rates voluntarily fixed by the railroads from and to certain cities within that state? If such is the law

then it becomes impossible for any body, either federal or state, to find what charges are reasonable for transporting property wholly within a state, and leaves all cities in any state subject to the caprice of the traffic officials of railroads serving the said state.

Subdivision 10. The question presented in this subdivision has to do with the rate of progression, which, according to the Master, should exist between a haul for a long distance, as compared with a haul for a short distance. The Master in this subdivision presents a rule which he says exists in every rate:

> "It is a cardinal principle in rate making that a rate for a longer distance should be proportionately smaller than one for a shorter distance." Page 204, case 599.

He then offers a concrete example to explain this rule, by the use of the class "E" rates from St. Paul, Minnesota, to Miles City, Montana, as compared with the class "E" rate, St. Paul to Moorhead, Minnesota and finds that, because the rate to Moorhead is but 8.87 mills per ton per mile, while the rate to Miles City is 10.57 mills per ton per mile, the Moorhead rate having been established on the basis of the rates named in the order of the Commission of September, 1906, "involves substantial, undue and unjust discrimination in fact against the interstate localities."

It would appear that the mere fact that the earnings of 8.87 mills per ton per mile, which defendants would receive, by the application of the 11-cent rate for a haul of 248 miles, St. Paul to Moorhead, for the lowest possible class commodities, such as sand, stone, brick, clay, etc. (class "E" commodities), should have at once challenged the attention of the Master, and have caused him to find some more satisfactory reason for setting aside the statute of the state of Minnesota. Exhibit No. 80, Elliott, shows that the average earnings per ton per mile for all of the Minnesota traffic was 8.714 mills; that the average earnings per ton per mile of the interstate traffic was but 8.279 mills. Compare 8.87 mills per

ton per mile (for hauling sand, for instance) with the average earnings of 8.714 mills per ton per mile for handling all the other Minnesota traffic, carloads and less than carloads all combined; does not this comparison clearly show that the 11-cent class "E" rate (which the Master has selected to make his illustration) is evidently too high as compared with all the other traffic which defendants handle under exactly the same circumstances and conditions as they do this St. Paul-Moorhead traffic. This being true, i. e., the 11-cent class "E" rate is now unreasonably high, what kind of a comparison has the Master made, when he places this rate up against a rate of 39 cents, class "E," St. Paul to Miles City, Montana? The fact is that 72 per cent of the haul, St. Paul to Miles City, is outside of Minnesota, through a territory where the conditions and circumstances of transportation are materially different to what they are in Minnesota, as we have conclusively shown.

The question presented by the Master in this subdivision as to what the rate of progression for a given distance shall be, has been clearly illustrated, in our reference to the merchandise rates into Nebraska points located beyond the Missouri River, in our reference to the merchandise rates from the east to Minnesota stations located west of the basing line stations, such as the Twin Cities, Duluth and Superior, also in our explanation of Baird's exhibit No. 43, lumber from Pacific Coast points to stations in Montana, North Dakota and Minnesota.

In numerous cases brought before the Federal Commission, this very question has been presented and the Commission has found it necessary to adjust the rates without regard to this relatively equal mileage progression, which the Master finds must be followed in the cases at bar, or in failing so to do, unjust discrimination in fact exists.

In *Johnson v. C., St. P., M. & O. Ry. Co.*, 9 I. C. C. Rep. 221, the city of Norfolk, Nebraska, sought to compel the railroad to establish equal progression mileage rates from Duluth, Minnesota, to Norfolk, Nebraska. The Commission in

that case found that there was no unjust discrimination, notwithstanding the fact that the rate Duluth, Minnesota, to the Missouri River basing point, Emerson, Nebraska, was 80 cents per hundredweight, first class, distance 441 miles, rate per ton per mile, 36.2 mills, and the rate from Emerson, Nebraska, (the Missouri River basing point), to Norfolk, Nebraska, 45 cents per hundredweight, first class, distance 46 miles, rate per ton per mile, 200 mills.

The through first class rate, Duluth, Minnesota, to Norfolk, Nebraska, was made on the sum of the locals on Emerson, which made the through rate 125 cents per hundredweight, first class. From the above it is readily seen that the rate for the last 46 miles on a shipment, Duluth to Norfolk, was 163.8 mills greater per ton per mile than on the 441 miles up to Emerson.

If the rates in the above cited case were found not to discriminate against the higher rate point, surely the rates, St. Paul to Miles City, as cited by the Master, should not have been found "to cause undue and unjust discrimination in fact," and a sufficient reason for the court to nullify the action of the Minnesota State Commission.

Subdivision 11. The Master claims that the sum of locals on Moorhead to many North Dakota stations from St. Paul is less than the through rate from St. Paul to such North Dakota points. The real cause of the change in these interstate rates as found by the Master is shown in his report (Nor. Pac. Vol. 1, p. 205):

> "As a matter of fact, the reasons for such reduction were to prevent trans-shipment at Moorhead in order to take advantage of the lower sum of the locals, to retain on its lines traffic which was liable to reach Moorhead over other lines by reason of competition."

Then, according to the Master's own idea, what really caused the reduction of the complainant's rates between St. Paul and stations in North Dakota, was a desire to meet competition, a proposition which we have discussed extensively elsewhere.

In the Ames case this same question was presented, and in that case this court found that "railroads could not plead their own convenience or competition between themselves and other companies."

Subdivision 12. The Master in this subdivision again presents the question of "rate of progressing", which should be used in making up a continuous mileage rate, for a short haul as compared to a longer haul, urging a second time his cardinal principle, except in this subdivision he calls the principle a "fundamental dogma". Page 205, case 599. He says:

> "It is one of the fundamental dogmas of rate-making, that the haulage charge per mile shall not increase with increasing distance, *if conditions be the same.*"

He then proceeds to divide a given rate into two separate portions, calling one part a "haulage charge" and the other part a "terminal charge". It is quite evident that the Master takes his cue, from which he reached the above conclusions, from the testimony of Messrs. Baird and Maguire. In Northern Pacific Record, page 1480, Mr. Baird answers as follows:

> "The merchandise rates are made on the basis of a terminal charge and a haulage charge which for five miles on first class freight is 12 cents per hundred pounds. For each five miles beyond the first five an additional hauling charge of .98 of a cent is added, up to 200 miles; and from 200 miles up to 500 miles an additional haulage charge of .98 of a cent is added for each additional ten miles. The lower classes so obtained are ascertained by applying a percentage of the first class."

A careful search of the record will develop the fact that this question of dividing a given rate into two separate and distinct portions was first introduced in the record by Mr. Baird, and by him so ingeniously interwoven with the question of the "rate of progression" that he succeeded in causing the Master to accept the .98 of a cent as an absolute haulage charge, and by the Master used as a controlling factor, which should determine what a given rate should be

for any distance on the Northern Pacific system, regardless of any other circumstances or conditions surrounding transportation.

The schedule of reasonable maximum, terminal and distributing merchandise rates, exhibit A, is simply a continuation of the general plan of making distance tariff rates which has been in use by railroad companies almost from their inception.

The charge made by the Northern Pacific prior to the time of putting in the order of the Commission, was 12 cents, first class, for a haul of fifteen miles, and 15 cents per hundred pounds, first class, for a haul of twenty miles; the difference being 3 cents is what Mr. Baird is pleased to term the haulage charge. The distance tariffs which the different railroads had in force prior to the time of putting in the order of the Commission named rates between all distances and between all classes just the same as the order promulgated by the Commission, with the exception of the amount of the rate. This distance tariff table is made for the purpose of enabling the agents of the railroad company to determine rates at a glance. If a shipment of boots and shoes was offered to a Northern Pacific agent, he would turn to his Western Classification and find that boots and shoes are classified as first class. He would then turn to his distance tariff table, and under the rates promulgated by the Commission find that the rate is, say for 50 miles, 20.82 cents per hundredweight, and the freight charges would be collected on this basis. All the money the company would receive for the service performed is wrapped up in this 20.82 cents. It must pay not only the terminal cost and the haulage cost, as indicated by Mr. Baird, but it must pay the maintenance of the roadway, maintenance of equipment, taxes, interest, and its proper proportion of every other expense the railroad company has to meet on account of being in the transportation business. Numerous witnesses who have testified in this case have said that it is impossible for them to arrive at the cost of doing any particular kind of business. Mr. Baird, himself, on page 1500, Volume 4, Northern Pacific Record, testified as follows:

"Q. Mr. Baird, is not this true, that when you say you can't ascertain the cost of moving any particular class of freight, you mean that you can't ascertain to your satisfaction the exact cost?

A. Yes, sir.

Q. But there is no doubt in your mind that the approximate cost can be ascertained, is there?

A. The approximate cost for hauling all of the traffic, as a whole, I believe can be ascertained, but not as to each particular part of the traffic."

If Mr. Baird is correct in his statement that the cost of handling any particular part of their freight traffic cannot be ascertained, it becomes very questionable whether it is practicable to attempt to separate rates into terminal charges and haulage charges. The meaning of the term "haulage cost" is very doubtful. It is an ambiguous word, and should be considered by the court with great care. Does it represent the cost of moving the car from the warehouse track to the make-up yards? Does it represent the cost of maintaining and operating the general superintendent's office? In other words, does the haulage charge include all of the revenue that the company received for transporting the shipment from the time it is loaded into the car at the point of origin until it is unloaded on the platform at the point of final destination?

It is futile to guess at what an average cost is, before the actual costs have been determined and the average found. When the complainants set up the average haul of interstate tons touching Minnesota, they first figure the actual number of tons handled and the actual distance carried, then find the average haul. Why should they not do the same in regard to intrastate cost? Is it enough to say it simply cannot be done and then ask the Master to guess?

We feel constrained to say, notwithstanding what others may have stated, that a rate named for a specific distance must be considered available for paying all of the expenses of operating the property as a whole, and until methods of cost accounting, as between the different kinds of service performed, are adopted, it is impossible to undertake to say how

much of any specific rate should be allowed for terminal cost and how much for haulage cost.

The schedule of rates compiled by the Railroad and Warehouse Commission of Minnesota on September 6, 1906, reflected the sound and mature judgment of the Commission as to what was a proper, reasonable and fair relationship between the various classes and a proper rate of progression on the various distances set forth; it was not as the Master would have the court believe a novel doctrine, the emanation of diseased brains or the product of a flighty imagination; if such is the case then let the odium fall where it belongs—on the railroads!

A cursory examination, or a searching analysis of *any* railroad made distance tariff will disclose that the plan adopted by the Minnesota Railroad and Warehouse Commission is the same now in use by the railroads and has been uniformly followed since distance tariffs were by them first invented—in every case certain rates of progression in rates for increasing distances are named, often fluctuating but in general maintaining a graduated increase with distance and the classes 2, 3, 4 and lettered classifications being certain percentages of the first class rates.

It is not necessary for a demonstration of this to set out the full classification, but in order to make comparison between class rates of the Commission and the railroads and to demonstrate beyond peradventure of doubt that the method, plan and theory pursued by the Commission is identical with that of the railroads, attention is especially directed to defendants' exhibit in Northern Pacific case, marked 3 E. to defendants' exihibits in Northern Pacific case, marked 3 E, Staples—supplemental 3 E. Staples and 3 F. Staples.

It will be noted that the graduation and percentages of the rates named in the Commission's order are regular and consistent while fluctuations of considerable percentages occur in the railroad rates shown in Exhibit 3 F, nevertheless making comparisons on 3 E and 3 F with the railroad made rates demonstrates clearly that the trend is the same in both and

the theory identical, the only difference being the more consistent application of the theory on the part of the Commission—whereby also differences in rates for the same distances by the various roads shown in Exhibit 3 E are eliminated.

If it is right that the first class rate of the Great Northern should increase from 49 cents for 140 miles to 50 cents for 150 miles, and remain the same for the next ten miles, then how can the raise of 4 cents for the next ten miles to 170 be defended? If the rate of progression from 200 to 210 and 220 is proper at 2 cents for each ten miles, then how can an advance of 3 cents for the next ten miles comply with the inexorable demands of the Master's basic doctrine?

The Master says, repeats and reiterates in various terms and dicta that the railroad rates prior to the action of the Commission were fair and equitably adjusted; if so, then where is the equity, when points 230 miles distant must pay a rate of 67 cents per 100 pounds on first class merchandise, while points 240 miles and on up to 300 miles or a greater distance of 30 per cent need, according to this most admirable and scientifically constructed tariff, pay the same 67 cents per 100 pounds.

The only answer is that the Master accepted as truth the testimony of the railroads on many points of the controversy without a careful analysis of the entire testimony and the exhibits introduced. The record shows that *the schedule framed by the Commission is consistent, while the tariffs of the companies are inconsistent, judged by the Master's own rule.*

In the latter part of this subdivision the following language is found:

> "This method suggested by defendants is not the principle, however, on which the state's schedule of rates is constructed, and even so, it does not give traffic carried on the extended interstate rate the benefit of the spread and the terminal expenses over the long haul."

Following the plan adopted by the Northern Pacific Railroad Company, as shown in complainants' exhibit No. 43, (Baird), where they carry the rate on lumber 700 miles at the same rate, it would be easy to see how the railroad company might treat their rates on westbound shipments, and still not discriminate in anywhere near the same degree that has been found perfectly satisfactory on eastbound lumber shipments.

In this subdivision is also presented the question of whether or not the complainant companies could maintain rates in North Dakota that were not adjusted on the same relative mileage progression as their rates in Minnesota without creating unjust discrimination.

The one reason given on pages 74, 115, wherein we have shown that the volume of traffic in Minnesota is 26 per cent and 53.8 per cent greater per mile of road on the lines of the Northern Pacific and the Great Northern than on other portions of their line, should be sufficient to answer this contention.

One of the chief witnesses on behalf of the carriers frankly conceded this difference of conditions in western territory. In the testimony of A. G. Maguire of the Great Northern the following occurs:

> "Q. And you know of course that the conditions of the haul upon the western line of your road—over mountains where the country is much more sparsely settled than in Minnesota—are such as to make the carriage of freight relatively much more expensive?
>
> A. Yes sir; I think it would be." (Great Northern Rec., 937)

The Master and the lower court appear to be laboring under the impression that all rates, or at least all merchandise or class rates, are adjusted on a relatively equal per mile haulage charge where through rates are named.

In numerous cases brought before the Federal Commission this very question has been presented, and the Commission has found it necessary to adjust the rates without regard to

this relatively equal mileage progression that the Master finds must be followed in cases at bar, or in failing so to do, unjust discrimination in fact exists.

In *Johnson v. C. St. P. M & O. Ry. Co.*, 9 I. C. C. Rep. 221, the city of Norfolk, Nebraska, sought to compel the railroad to establish equal progression mileage rates from Duluth, Minnesota, to Norfolk, Nebraska. The Commission in that case found that there was no unjust discrimination, notwithstanding the fact that the rate Duluth, Minnesota, to the Nebraska basing point, Emerson, Nebraska, was 80 cents per hundredweight, first class, distance 441 miles, rate per ton per mile 36.2 mills, and the rate from Emerson, Nebraska, (the Missouri River basing point) to Norfolk, Nebraska, 45 cents per hundredweight, first class, distance 46 miles, rate per ton per mile 200 mills.

The through first class rate, Duluth, Minnesota, to Norfolk, Nebraska, was made on the sum of the locals on Emerson, which made the through rate 125 cents per hundredweight, first class. From the above it is readily seen that the rate for the last 46 miles on a shipment Duluth to Norfolk, was 163.8 mills greater per ton per mile than on the 441 miles up to Emerson.

If the rates in the above cited case were found not to discriminate against the higher rate point, surely the rates complained of in the case at bar should not have been found to cause undue and unjust discrimination in fact, for the difference in the rates contained in the order of September, 1906, and the old rates mentioned by the complainants in North Dakota, on shipments from Minnesota points, were not nearly so marked as those shown in the above case.

In subdivision 13 the Master continues to further apply this .98 of a cent as a basis for arriving at what the rates will be at Butte, Montana. Is it reasonable to suppose that the rates of the entire western portion of the United States may be upset on account of the railroads, complainants in this case, being compelled to extend this .98 of a cent haulage charge to its western basing points such as Butte, Spokane

and Seattle? We learn from the testimony that the merchandise rates named in the Commission's order of September, 1906, have been in effect for more than two years, and that the complainants, Northern Pacific and Great Northern companies, have not paid any attention to the reduction made by the Commission's order beyond Bismarck, North Dakota.

Subdivision 14, page 207, the Master finds that the reduction of the rates in Minnesota cause undue and unjust discrimination against interstate shipments having point of origin in localities easterly or southerly in the state of Minnesota, and cities located in eastern territory. As an example he cites the former through rates from Chicago to Wadena, Minnesota, on first class merchandise. This rate was $1.09 per hundredweight before the order of the Commission was promulgated. After the order was put in this rate was reduced to $1.004. This is another example similar to the one hereinbefore cited, when explaining the effect of the rates from Mississippi River points to Hastings, Nebraska. From the testimony we learn that the rate from Chicago to St Paul is 60 cents per hundredweight, first class, short line distance 410 miles, which would be at the rate of 29.2 mills per ton per mile. The rate from St. Paul to Wadena, Minnesota, old basis, was 49 cents per hundredweight, or at a rate of 61.6 mills per ton per mile; in other words, for the last 159 mile haul of a shipment from Chicago first class to Wadena, Minn., the carrier received 32.4 mills more per ton per mile than was received for hauling the shipment from Chicago to St. Paul. If the carrier still chooses to make up the through St. Paul-Wadena rate on the combination of locals, that portion of the haul between Chicago and St. Paul would remain 29.2 mills per ton-mile, while the new rate between St. Paul and Wadena would be 50.8 mills per ton mile. This would cause the new combination to be Chicago-St. Paul 29.2 mills per ton-mile, and St. Paul-Wadena 50.8 mills per ton-mile; as compared to the former combination of the Chicago-St. Paul rate of 29.2 mills, and the St. Paul-Wadena rate of 61.6 mills. This is another illustration of what Justice Brewer appeared to consider in the Ames

case as a convenience for the benefit of the railroad companies in making up their through rates on basing point stations.

In *subdivision* 15 page 207 Northern Pacific Rec. Volume 1, the Master finds as follows:

> "The proof is clear that conditions attending transportation are substantially the same in Minnesota and North Dakota,"

and undertakes to find that there is unjust and undue preference or advantage, because the rates are different in Minnesota from rates in North Dakota.

This part of the Master's findings does not disclose whether he took into account the figures showing the volume of traffic hereinbefore mentioned, to wit: that the volume of freight traffic on the Northern Pacific in Minnesota is 26 per cent greater, and the volume of passenger traffic is 12.2 per cent greater than on other portions of its line, and on the Great Northern the freight tonnage is 53.2 per cent more in Minnesota, and passenger traffic is 30.4 per cent greater than on other portions of its line. Is it not fair to assume that the Railroad and Warehouse Commission and the legislature of Minnesota considered the matter of volume of traffic in that state in arriving at what they considered was a reasonable charge for the transportation of persons and property between points in Minnesota before promulgating the orders or enacting the statutes complained of in the cases at bar? On the other hand the Master has reached his conclusions above stated from the bald statements of the railroad general freight agents, without any figures whatever to substantiate their claims.

In *subdivision* 16 the Master finds that because a rate of 68.8 cents obtains in Minnesota for a distance of 390 miles (which has been found by the Railroad and Warehouse Commission to be a reasonable charge) and a rate of 96 cents for a haul of 390 miles, a part of which is in Minnesota and a part in North Dakota, by reason of this fact, "undue and unjust

discrimination in fact exists". In order to arrive at this conclusion he assumes that conditions attending the transportation of merchandise are substantially the same in Minnesota as in North Dakota. Here, again, the question of the volume of traffic will surely be a sufficient explanation for the difference in the rate per ton per mile on a haul of 390 miles in Minnesota as compared to a haul of 390 miles in Minnesota and North Dakota.

In *subdivision* 17 page 208, case 599, the Master appears to complain of the order issued by the Railroad and Warehouse Commission, September 6, 1906, in which it prescribed a fixed relationship between rates on the same class for different distances, and a fixed relationship between rates for different classes for the same distance, and therefore manifestly a fixed relation between rates for different distances and different classes.

His reason, given in the latter part of this subdivision, as to why this rule may not be fair, is because it prescribed a fixed relationship between rates for different distances and for different classes, and if this relationship should not be continued by the complainant after the Minnesota state line is passed the same would cause undue and unjust discrimination in fact.

Evidently the Master has not investigated the old basis of rates promulgated and used by the complainant companies prior to the time of putting in the order of September, 1906, although pages of testimony have been taken on this point. From this testimony it appears that the complainants in these cases were undertaking to show that this method of a fixed percentage between different classes is in and of itself built on a wrong principle. It is hard to understand from what point they expect to make headway in this contention.

From Mr. Baird's testimony we learn that the basis of the rates named in the distance tariff is found in the Western Classification. In this classification, he tells us, all of the commodities "known to commerce" have been carefully classified, and the proper relationship found that should exist be-

tween different commodities. After taking into account the liability of loss, the space occupied in the car, and all of the different conditions that are necessary in order to determine whether an article shall be first, second, third or fourth class, in less than car load shipments, or whether it shall be fifth class or any of the classes between fifth and class E on carload shipments, surely complainants would not contend that after the most careful consideration by railroad men and representatives of shippers skilled in the art of compiling a classification, and all of these matters had been definitely settled, that complainants had a right to discriminate between articles shipped under the same class for different distances. This point is illustrated in exhibit 3-F, Staples, which exhibit shows the different percentages existing on the old schedule of rates used by the Northern Pacific before the order of September 6, 1906, was put in force. In this exhibit the first class is taken as 100 per cent and the percentage existing between all of the other classes for shipments up to 201 miles is compared. At thirteen miles it will be seen in the second column that second class is 83.33 per cent of the first class, at 46 miles 86.66 per cent of the first class, at 79 miles 83.78 per cent of the first class, and so on down, and the entire column showed the variation of shipments under this class ranging as much as 4 per cent. If in the classification the proper relationship has been found between the different classes, why is not the plan adopted by the Minnesota Railroad and Warehouse Commission very much more fair than that adopted by railroad companies before this order was promulgated? It was for the purpose of preventing discrimination that this plan was adopted by the Commission, as shown by the testimony of Mr. Staples, and from close examination of the testimony no evidence has been introduced that could lead the court to think that there was anything fundamentally wrong in the plans so adopted.

The argument that the rate of progression differs from the interstate rate of progression falls back upon the same proposition that the just one must prevail, if any claim of discrimination is rightfully raised by the proper parties and proven

in a proper manner. In the present case the proper parties are not in court to claim discrimination, and the complainants offer no proof and make no claim that the rates of progression in Minnesota are unjust, but that they differ from certain other rates in other territory fixed by the carriers and never tested by any court nor by any tribunal.

Subdivision 18 claim that defendant companies have reduced their interstate rates on merchandise from certain terminals in Wisconsin and Minnesota to points in North Dakota to correspond with the sum of the locals from eastern Minnesota terminals to towns on the western border of Minnesota with final destinations, stations in North Dakota. If conditions in Minnesota on account of volume of traffic allow lower rates and thereby reduce the rates to western Minnesota stations, surely it cannot be claimed that because of such reduction the complainant companies may find it to their advantage, "for their own convenience, or the effect of competition between themselves and other companies", to reduce the through interstate rate for the haul west of the Minnesota and North Dakota state line, and for this reason the Minnesota-made rates cause "undue and unjust descrimination". This point was fully discussed in subdivisions 7, 10 and 14. Nothing new has been added by the Master in subdivision 18.

In *Subdivision* 19 the Master finds that because the rates from the so-called twin cities on the western border of Minnesota and eastern border of North Dakota are different to stations in Minnesota than they are to stations in North Dakota, and by reason of this fact that undue and unjust discrimination exists. This assumption of the Master is evidently based entirely on the conclusion that conditions are substantially alike, so far as transportation goes, in North Dakota as in Minnesota, which we have shown above is not a true basis on which to reach the conclusion stated above, on account of the volume of traffic being so materially different in the two states.

In *Subdivision 20* the Master finds that because a different mileage rate of progression would have to be used by complainant companies for the transportation of commodities between North Dakota and Minnesota points, the rate for the haul in North Dakota not being adjusted on the same basis, as for the haul in Minnesota, the same would constitute unjust and undue discrimination. In the case above cited by the Interstate Commerce Commission it was shown that sudden breaks in a continuous mileage rate might be made without causing undue and unjust discrimination, and if it is a fact, which we think we have conclusively shown, that the conditions surrounding transportation in North Dakota differ from those in Minnesota, then in that case surely the Master's contention that undue and unjust discrimination in fact exists, where rates, either westbound or eastbound, break as to the rate of progression at the North Dakota-Minnesota state line is not sustained.

In *Subdivision* 21 the Master finds that because the legislature of the state of Minnesota reduced the rates on coal, as described in chapter 232, the rates on coal from Wisconsin, Michigan and Illinois would have to be reduced or mines located in these states would not be able to sell their product in Minnesota in competition with coal coming to those stations via Duluth. This involves one of the basic issues discussed in section 1 of this part of the brief.

Subdivision 23, page 212. Nor. Pac. Vol. 1. The Master in this subdivision makes mention of, and appears to have the idea, that the privilege granted by the railroads of allowing milling in transit at milling points outside of Minneapolis necessarily makes a changed condition when the Minnesota rates prescribed by chapter 232 are taken into account. Milling in transit privileges have nothing whatever to do with freight rates, where tariffs provide that grain may be milled in transit at points other than Minneapolis. The mere fact that rates are changed for any reason whatever could not possibly give the millers located at Minneapolis advantageous rates over inland millers. The rate from the original point of ship-

ment of the grain would be the same, whether milled at an inland milling point or at Minneapolis. In this subdivision we wish to call the Court's attention to the fact that here is another nice illustration of how the rates are made up on grain originating in Minnesota, destined to Chicago. The Master here states that the rate from Minneapolis to Chicago is at the present time, and for many years past has been, 7.5 cents per hundredweight, short line distance, Minneapolis to Chicago, 410 miles, or at the rate of 3.66 mills per ton per mile. By reference to chapter 232, page 23, volume 1, Northern Pacific Record, we find the Minnesota rate for 100 miles on wheat is 7.8 cents, or at the rate of 15.6 mills per ton per mile. From the above it is shown that the grain rates within Minnesota pay a very much higher return to the complainant companies than the connecting lines receive for hauling the same grain, St. Paul to Chicago, and further illustrates the fact that rates from Minnesota on shipments of the commodities named in chapter 232 to points east of Minnesota are not adjusted on a relatively fair progressive mileage basis. If it be true, as stated by the learned judge, that rates to North Dakota points must be established on the same relative progressive mileage basis west of the Minnesota-North Dakota state line, as those established up to the state line in Minnesota, or, failing to be so established, undue and unjust discrimination in fact exists, then in that case how could he justify the grain rates above referred to?

The judge, in his opinion (page 412, Nor. Pac. Vol. 1), after quoting from the decision of Justice Brewer in *Ames v. U. P. R. R. Co.*, continues as follows:

> "Whether or not the general and sweeping reductions in local rates in Minnesota necessarily interfere with interstate rates and interstate commerce, is in this case, as it must be in every case, a question of fact. * *
>
> "These facts are that it was not for 'their own convenience', but at great inconvenience and loss, not on account of the effect of competition between themselves and other companies. * * *
>
> "The opinion of Mr. Justice Brewer in the Ames case is inapplicable in the cases at hand because no such array

of condemnatory facts was ever submitted to him in that question, *and it is perhaps not too much to say that no case has been found in the books in which any such proof of the unavoidable effect of general reduction of intrastate rates to substantially burden and destroy the regulation of interstate rates has ever been presented.*"

The learned judge appears to be uninformed when he undertakes to say that he knows of no case where the evidence was similar to that presented in the cases at bar.

In the Missouri Rate Cases, tried before Judge McPherson, it was shown that there were basing points on the Mississippi River on the eastern border of the state and that there were also basing points on the Missouri River on the western border, and it is common knowledge that these two rivers are used by the railroad companies in making up their through rates from and to all points in all states west of Missouri.

In the Missouri case there were basing points all along the eastern border of the state and the traffic through these points was very much in excess of the traffic through basing points such as St. Paul and Duluth, located in Minnesota.

On the western border of Missouri are located large cities, such as St. Joseph and Kansas City, and on the western side of the Missouri River, Atchison, Leavenworth and Kansas City, Kansas. The rates from these cities are used in making up the through rates from points on the Mississippi River and east thereof to all of the territory west, including Rocky Mountain and Pacific Coast territory. A large number of eastern trunk line railroads have their western termini at some of these Missouri River cities named, and several of the railroads that traverse the territory between the Missouri River and the Pacific Coast have their eastern termini in some of the cities located on the western border of Missouri or the eastern border of Kansas. Therefore, any changes in the rates, passenger or freight, in the state of Missouri, would seem to make a change in through rates obligatory. No such condition exists in the Minnesota cases. None of the complainant companies have their terminals on the western

border of Minnesota or the eastern border of North or South Dakota.

The Missouri River is the western boundary of the Western Trunk Line Association, and the Mississippi River forms a portion of the eastern boundary of the territory of that Association, and on account of these basing points it makes the question of the change of rates in Missouri of very much greater moment than a change of rates in Minnesota could possibly make. Unless railroads west of the Mississippi River change their method of making rates in the west and southwest, any change of rates in the state of Missouri would, according to their former custom, make a change in the whole territory. This condition does not exist on the western border of Minnesota, and yet the judge, in deciding the Missouri case, found that a change of rates in Missouri did not of necessity burden and interfere with interstate commerce, and later, after Judge Sanborn's decision had been rendered, when he was rendering his decision in the Iowa Express cases, heretofore quoted, he confirmed his opinion of handling this question in the Missouri case.

B. AN ANALYSIS OF THE BASIC PRINCIPLES RELIED UPON BY JUDGE SANBORN, AND THEIR APPLICATION TO THE FACTS IN THESE CASES.

Three fundamental misconceptions in the mind of Judge Sanborn will become apparent in our further discussion.

First. The conditions surrounding the traffic in Minnesota, and the other Western States are not the same, though it is so stated by Mr. Otis and Judge Sanborn. On the contrary we find the density of freight traffic on the different railroads of the Northwest ranges from 25 to 50 per cent greater in Minnesota than on the balance of these lines.

Second. The rate adjustment in Minnesota, North Dakota, South Dakota, Montana, Wisconsin, and neighboring states was not, and is not, on the same basis. There never has been any pretense of placing these rates on the same plane. Scores of concrete examples illustrating this fact will be presented.

Third. The fact that the tariff sheets of the carriers are on file with the Interstate Commerce Commission does not raise the legal presumption, apparently adopted by Judge Sanborn, that the interstate rates therein quoted, are reasonable and just.

Without making, or pretending to make, any investigation as to the reasonableness of the former interstate rate adjustment, Judge Sanborn and Special Master Otis make bold to assert that it was relatively fair and reasonable. There is no evidence in the entire record to support this conclusion.

The presumption of the lawful and relatively fair basis of state and interstate rates prior to the action of the Minnesota authorities is described by the Master as one of fact, but the phraseology is changed by Judge Sanborn so as to make it a presumption of law, because the tariffs have been filed with the Interstate Commerce Commission.

The two passages referred to are the following:

The Master said:

> "Each of said companies had, prior to the taking effect of the order of September 6, 1906, and the two-cent maximum passenger fare law, maintained an equable, that is, a relatively fair basis of rates for merchandise and passengers the transportation of which touched Minnesota without regard to whether the transportation was state or interstate between Minnesota and an adjoining state, and each of them still maintains such equable basis of rates for the transportation of commodities covered by Chap. 232, Gen. Laws 1907, regardless of whether it is local within Minnesota or interstate between Minnesota and an adjoining state." (Nor. Pac. Rec. Vol. 1, p. 201.)

The lower court re-arranges this presumption in the following language:

> "Prior to the orders and acts here in question the fares and rates in force upon these lines of railway for the transportation of passengers and freight were lawful, for they had been adopted in accordance with the provisions of the act of Congress, were relatively fair, and were not discriminatory between interstate business and business local to any state." (Nor. Pac. Rec. Vol. 1, p. 391.)

The presumption of law here suggested is not sound.

The position taken by the Court in *Illinois Central Co. v. I. C. C.* (206 U. S. 441) is applicable, where it was held that there exists no presumption of law that rates are reasonably low simply because they have been duly published by a carrier.

The Result of Changing State Rates Without a Corresponding Change in the Interstate Rates.

We find substantially the following clause repeated over and over at the conclusion of paragraphs reciting facts found by the Master:

> "Maintaining rates, comparison of which shows this result, involves substantial, undue and unjust discrimination in fact against the interstate localities."

The lower court bases his decision upon these findings. This necessitates a thorough analysis of those facts.

The lower court claims that an unjust discrimination is necessarily created by a change in the state rates without a corresponding change in the interstate rates. The fundamental assumption necessary to support such a proposition is that *the former relationship between said rates was just, and also the assumption that the interstate rates remaining unchanged are just.*

One of the typical sweeping assumptions made by the Master, in harmony with the foregoing proposition, is embraced in the following paragraph, to be found in Nor. Pac. Rec. Vol. 1, p. 214:

> "Prior to the taking effect of the respective orders complained of and of the two cent maximum passenger fare law, the tariffs of the Great Northern and Northern Pacific Companies for the transportation of passengers or merchandise in Wisconsin, Minnesota, North Dakota and South Dakota were fair as between the different states, and the local tariffs in each state were fair as compared with the interstate tariffs between such states or any two thereof; and the tariffs now maintained by the companies and each of them for the transportation of commodities covered by Chapter 232 are fair as between these states, and the local tariffs in each state are fair as compared with the interstate tariffs between such states or any two thereof."

The lower court adopts the findings of the Master in every particular, entirely relying upon them, and using the language of the Master largely, consequently much of what we quote will be from the Master's report upon which the opinion of the lower court is based in its entirety. Judge Sanborn makes the following comment in his opinion to that effect:

> "The facts which have been recited were found by the Master, and the foregoing statement of them is, with rare exceptions, in his clear and concise language." (Nor. Pac. Rec. Vol. 1, p. 407.)

Where are the facts to justify such assumptions as those stated in the quotation above? Neither the record, nor the briefs, nor the report of the Master, show any investigation of the interstate rates or their relationship to the state rates. in this territory.

No court and no commission has ever investigated or claimed to have passed upon the relationship between the state and interstate rates in this territory, existing prior to the action of the Minnesota authorities.

Mr. Otis seems to have never even tested that situation by his own "cardinal principles".

In order to make any substantial change in rates cause an unjust discrimination the Master frames up an ideal picture with the following essential elements:

1st. *The assumption that the conditions surrounding traffic for the same distances in this territory are the same;*

2nd. *The assumption that the former adjustment of rates, state and interstate was equable and relatively just; and,*

3d. *Any change in a few of these rates and not in all the rest will upset this whole system, and necessarily cause unjust discrimination in fact.*

The Master has pictured a beautiful net-work of rates so closely interlaced and dependent upon each other, so justly and delicately balanced that a change in any part, without a corresponding change in all parts of the territory between the Missouri River and the Pacific Coast, would result in unjust discrimination. The manner of the creation of this wonderful rate adjustment in the mind of the Master is worthy of a place unique in literature. We will give the lower Court's language, which is substantially a verbatim copy of the Master's words; and then, in order to see if his conclusion that the adjustment is so equable and just and so closely connected

that any change in one part without a corresponding change in all the rest results in unjust discrimination, we will test this theory by the actual experience of these same companies.

The following is a typical passage from the opinion of the Court:

> "The order of September 6, 1906, as supplemented by the order of May 3, 1907, substantially reduced car load rates from Duluth, St. Paul, and Minneapolis to Moorhead. This reduction would have given Moorhead a substantial advantage in territory accessible to its jobbing industry, not only as against Fargo unless car load rates to Fargo should have been similarly reduced, but also as against Duluth, St. Paul and Minneapolis, unless less than car load rates from these points to points geographically accessible to Moorhead, which included a considerable territory in North Dakota, should have been proportionately reduced. This reduction, unless accompanied by a corresponding reduction in car load rates to Fargo from the eastern terminals, would have served to build up Moorhead at the expense of Fargo, and therefore to discriminate unduly and unjustly against Fargo as a matter of fact, and would destroy the relation in rates which had theretofore existed between the sum of car load rates into Moorhead and less than car load distributing rates out on the one hand, and less than car load distributing rates from Duluth, St. Paul and Minneapolis to localities accessible to Moorhead on the other. If Fargo were protected as against Moorhead by a like reduction in car load rates, it would have an advantage and preference over Bismarck in territory common to them both and an advantage over the eastern terminals in territory common to Fargo and them, unless car load rates from the eastern terminals to Bismarck and less than car load rates from the eastern terminals to the territory accessible to Fargo should be correspondingly reduced; and this advantage would constitute an undue and unjust preference to Fargo as against Bismarck, which competes in certain territory with Fargo, unless rates on car load lots from the eastern terminals to Bismarck should be correspondingly reduced. And so on, from distributing point to distributing point.

"For more than 25 years the Northern Pacific company has maintained an equal basis of rates on merchandise between its eastern terminals and Butte and its western terminals and Butte, and between its eastern terminals and localities intermediate between them and Butte, and between its western terminals and localities intermediate between them and Butte. Other railroads reaching Butte have during the same time maintained like rates to Butte from Sioux City, Omaha, St. Joseph, and Kansas City on the east, and from San Francisco, Sacramento, and Los Angeles on the west. Butte has been as the hub of a wheel, with spokes representing equal rates to these various cities. Industries have been born and have grown in reliance upon this parity of rates.

"The Northern Pacific Company cannot maintain its present Commission-made rates between its eastern terminals and Moorhead, and at the same time its present interstate rates from its eastern terminals to Butte without substantial discrimination in fact against Butte or localities intermediate between its eastern terminals and Butte. If it lowers its rates from its eastern terminals to Butte and intermediate stations to such an extent as to obviate substantial discrimination in fact, it must, to preserve the relation which has always existed, lower to a like extent its rates from its western terminals to Butte and intermediate stations. If, then, the Northern Pacific maintains the Commission-made rates between its eastern terminals and Moorhead, it must either substantially discriminate in fact or destroy the general relation of rates which has existed for many years in the territory between the Missouri River and the Pacific Coast." (Nor. Pac. Rec. Vol., 1, p. 397, 398.)

If the Master's opinion, as quoted by the Court, is correct, neither the state commissions, nor the Interstate Commerce Commission could act separately. Local rates could never be disturbed without changing interstate rates, and interstate rates could never be changed without altering the state rates. No rate could be changed without changing the entire scheme of rates to the Coast—a sort of vast teeter-board with an infinity of fulcrums. Were this true no change could be

effected, the vastness of the entire scheme would become fixed and rigid of its own complexity.

If this intricate, delicately balanced net-work is true we could not make any reduction, or raise, any place without upsetting the balance in the rest of the country. This beautiful creation of Mr. Otis' imagination can easily be tested by an examination of existing tariffs. If this conception should be found true, then as a practical matter both State and Interstate Commerce Commissions would be completely paralyzed. It would be impossible for either to do anything in regard to rates; for if a change was effected at one place it would have to be reflected over the entire country from ocean to ocean, otherwise an unjust discrimination would result. What is true as to a change in the Moorhead-St. Paul rate, as described by the Master in his opinion, Nor. Pac. Rec. Vol. 1, pp. 204, 205, would apply to any other point.

If this line of argument is sound, and if it can be carried to its legitimate conclusion, it will become a physical impossibility for either state commissions or the Interstate Commerce Commission to change any more rates. The law says that the carriers are entitled to a full hearing on any proposed change, and Judge Sanborn says all rates are presumed to be reasonable until found to be unreasonable by the Interstate Commerce Commission. If that be true no change can be made which will affect rates upon which the carriers have not had a full hearing. As all rates are surrounded by a net work of competition and a change in one rate will be reflected clear to the coast, where is the rate that can be altered until you have had a hearing on all the rates in the United States? This whole complicated fabric has finally reached a stage of perfection. It must all rise and fall as one entire system. If the Interstate Commerce Commission should attempt to fix a rate from St. Paul to Fargo, it will discriminate against Bismarck, and Bismarck rates must be presumed to be reasonable until the Commission finds otherwise, but the Commission cannot so find the Bismarck-St. Paul rates until "after full hearing"; and the change at Bismarck cannot be made with-

out unjustly discriminating against Butte, Montana, which rate must be presumed to be reasonable until found otherwise, and that finding cannot be made until "after full hearing", etc., etc., *ad infinitum*. The whole fabric must be raised or lowered at the same time.

The Interstate Commerce Commission has had precisely the same line of argument presented to it as this which you are now hearing, and the Commission gave it but little consideration.

In *Montgomery Freight Bureau v. L. & N. R. R. Co.*, 17 I. C. C. Rep., 521, 529, the Commission was considering the necessity of removing certain discriminations applying at Montgomery. It was contended by the carriers that "a reduction in the rates to Montgomery would necessitate similar reductions to all the basing points in Southeastern territory, including Birmingham, Chattanooga, Atlanta, Macon, Augusta, Opelika, Columbus, and Eufaula, because the bases used in making rates into that territory have fixed the relation of the rates to all of those points". In reply to this objection the Commission stated that if the reduction would simply be followed by the changes at competitive points restoring the present relation of rates, there would be no justification for the change unless it was shown "that the existing rates yield to the carriers undue and excessive revenues". Upon the other proposition that the reduction at Montgomery would affect the rates at Birmingham, Atlanta, Chattanooga, etc., the Commission stated:

"If it were shown that Montgomery is unjustly discriminated against as compared with any other locality similarly conditioned and situated, the fact that removal of that discrimination would cause disturbance of rates at other points would be of little weight."

There may come a time some day when conditions have become settled in this country, and when our rates are in fact placed upon a perfect basis, then the Master's idea will be true. That will occur about the morning of the Millenium. At the present time there is great confusion in our rate system. Any

person at all familiar with the real facts knows this to be true. Our present system has been built upon a haphazard method, favors were granted from time to time to this city or that big shipper, special rates have been put in effect to build up a certain locality, then that locality demands the permanent retention of those special rates, on the ground of a vested right.

Our tariff sheets are full of inconsistencies. All railroad men know this to be true. Our commissions know this to be true. On the whole, however, it seems remarkable they are not worse than we find them. There has been no fundamental guiding principle controlling the building up of our rate system. A new line or branch has been projected into a new locality, into a wilderness where no man lives, and a system of rates has been framed up to encourage and create traffic in that locality at the earliest possible moment. A lumber region is developed, then the forests disappear, and grain shipments take their place; a mine sends ore, later the vein is exhausted, and some other traffic must be secured. In this ebb and flow of pioneer days rates are constantly fluctuating. But there comes a day later on when that region is settled up, traffic becomes established along certain lines, the day is reached when the percentage of high grade and low grade commodities and merchandise is somewhat the same from year to year. It is inconceivable that the rate system built up by piece meal in early days should be fastened forevermore upon posterity. Gradually the change must come.

That the ideally perfect system, conceived by Mr. Otis, has not yet come, can best be demonstrated by the application of the "cardinal principles", as framed by Mr Otis himself, to the actual rates voluntarily established by these same carriers in this same territory.

Mr. Otis begins by laying down three fundamental propositions: 1st, That conditions attending transportation in these states "are substantially the same for like distances"; 2d, That each of said companies had, prior to the taking effect of the state made rates, "maintained an equable, that is a

relatively fair basis of rates" in all this territory; and 3d, That "any substantial change—will constitute actual, undue and unjust discrimination in fact". (Nor. Pac. Rec. Vol. 1, p. 201.)

The second proposition is fundamental to the third. Once the fallacy is shown in the statement that the existing schedule of rates (both state and interstate prior to the action of the Minnesota Legislature and Commission) was equitable and fair, then the third proposition, which is a corollary of the second, to the effect that any substantial change in any of these rates, destroying this ideal relationship, would necessarily cause unjust discrimination, that corollary must also fall to the ground. The third proposition is wholly dependent upon the second. The easiest and quickest way to test the correctness of Mr. Otis' second proposition is to apply his own so-called "cardinal principles", by which he himself later tests the Minnesota rates as compared to the interstate rates. If these "cardinal principles" are not true, then his conclusions as to the injustice of the Minnesota rates are fallacious. If his "cardinal principles" are true, then there are discriminations in fact existing between the new Minnesota rates and the interstate rates. This discrimination may result from unduly high, and consequently unfair, interstate rates, or unduly low and unfair state rates. In order to throw the responsibility upon the state rates for creating this discrimination, Mr. Otis rests his whole argument upon the proposition that the prior scheme of rates was "equable and fair". *This becomes the cornerstone of his entire superstructure.* If prior to the action of the Minnesota authorities such an ideal relationship did not exist, then his logic falls to the ground; he cannot claim, no one can claim, that the Minnesota rates *cause* an unjust discrimination until you know whether or not those rates are reasonable. The interstate rates may be the cause, they may be too high, we cannot assume the state rates are too low, *unless the former schedule of rates, and their mutual relationship between both state and interstate, was substantially "equable and just".* If those former rates fail to withstand the test of his own "cardinal

principles", then either those former rates were not "equable and just", or those "cardinal principles" are not true.

Two of the fundamental essentials of a just and reasonable rate, as stated by Judge Sanborn, in the language of Special Master Otis, are as follows:

THE CARDINAL PRINCIPLES OF SPECIAL MASTER OTIS.

I. *It is a cardinal principle of rate making that a rate for a longer distance should be proportionately smaller than one for a shorter distance.* (Nor. Pac. Rec. Vol. 1, p. 204.)

Another way the Master has stated the same idea is as follows: It is one of the fundamental dogmas of rate making that the haulage charge per mile shall not increase with increasing distance, if conditions be the same. (Nor. Pac. Rec. Vol. 1, p. 205.)

II. *If unjust and undue preference or advantage in rates is to be avoided, like rates must exist for like distances under like circumstances.* (Nor. Pac. Rec. Vol. 1, p. 207.)

The second principle is repeated in other words at several places in the Master's Report. Another statement of this doctrine is as follows: "If conditions are substantially the same, rates for like distances should be the same, and if not the same, undue and unjust discrimination in fact will exist." (Nor. Pac. Rec. Vol. 1, p. 210.)

Now let us apply these principles to the traffic in Minnesota, North Dakota, South Dakota, Montana, Idaho and Washington, and find out whether this interstate scheme of rates can be accepted as a standard, in which the rates are "equable and just". If they do not stand this test, then either that ideal delicately balanced scheme of rates is a myth, or the principles, by which he tests the present relationship, are not true. One or the other must fall. And if either one fails, then Judge Sanborn's whole argument about any change in that prior relationship producing unjust discrimination in fact, not in law, falls to the ground.

As to similarity of conditions in this territory the Master says:

"For many years the conditions attending the transportation of passengers, of merchandise covered by the Order of September 6, 1906, or of commodities covered by Chap. 232, Gen. Laws 1907, have been and still are substantially the same for like distances within those portions of the states of Wisconsin, Minnesota, North Dakota, and South Dakota reached by the lines of railway operated by either of said companies." (Nor. Pac. Rec. Vol. 1, p. 201.)

The learned Court begins one paragraph of his opinion with the first general doctrine of rate making, announced by Special Master Otis and quoted above, in the following language: "It is one of the fundamental dogmas of rate making that the haulage charge per mile shall not increase with increasing distance, if conditions be the same." Then follows a statement of the haulage charge per mile under the Minnesota tariffs on a shipment from St. Paul to Moorhead, supplementing this with an extension or projection of this same average haulage charge on over the rest of the line to Spokane, Washington, a distance of 1,510 miles, producing a rate from St. Paul to Spokane of $1.79 per cwt., as compared to the rate for that haul fixed by the Interstate Commerce Commission of $2.50. The Court concludes this paragraph with the following: "Maintaining this rate from St. Paul to Spokane and the Commission's schedule in Minnesota at the same time necessarily involves the raising of the per mile haulage charge after the Minnesota state line has been crossed," or the charging of a higher rate on the Minnesota proportion of the through rate, than on local shipments, "and involves necessarily undue and unjust discrimination in fact against localities westerly of the Minnesota-North Dakota boundary line".

Special attention is called to this phase of the foregoing statement: the conclusion cannot logically follow from the premise stated unless "conditions are the same", as stated in the premise. For if conditions were not the same in North Dakota, Montana, Idaho and Washington as in Minnesota it

would be entirely proper that the haulage charge should be changed after the Minnesota state line was crossed. If the construction cost is greater, if the grades are steeper, if the traffic is not so dense, if the towns are farther apart, these factors would justify a raise in the haulage charge. The Court's and the Master's necessary assumption that conditions remain the same in this Western territory out to Spokane, Washington, as in Minnesota, is completely refuted by the record in this case.

The rate of progression in the Minnesota rates is mentioned briefly by the Court (Nor. Pac. Rec. Vol. 1, p. 401). No criticism of this method of having a uniform rate of progression is offered either by the Master or the Court, nor is any criticism offered of the particular rate of progression prescribed. The entire burden of the criticism relates to the fact that the state rate of progression may differ from the interstate progression. Our comments upon the similar question of difference in rates are equally applicable to this situation.

If conditions are in fact substantially the same in this territory, and Mr. Otis' principles are correct, we should find rates to be equal for equal distances, we should find a gradual proportionate decline in the rates for longer distances, and we should find that during "the past 25 years" a closely coordinated rate adjustment existed, in which each change at any particular point has been carefully and proportionately reflected at every other point in the system.

Conditions in This Territory.

It is common knowledge that the vital basic conditions including density of traffic, the character of engineering and construction costs, and costs of operation vary greatly in these states. In 1907 the report of the Northern Pacific Railway Company to the Minnesota Railroad and Warehouse Commission showed its net income from operation above operating expenses to be $7,013 per mile of road in Minnesota, and only $5,666 on its entire line; in other words, its income averaged 24 per cent greater in Minnesota than on its entire line,

including Minnesota, and extending from St. Paul to the Coast. (23d Annual Report of the Railroad and Warehouse Commission of Minnesota, pages 206 and 207.) The same report shows the number of tons hauled one mile per mile of road was 243,011 greater, or 24 per cent, in Minnesota than on the entire line.

Let us examine the record for the volume of freight traffic in Minnesota as compared with the system, Minnesota excluded. The following figures are taken from the annual reports of the companies for the year ending June 30, 1908. (Nor. Pac. Rec. at end of Vol. 1, pages 93 and 93-A and Grt. Nor. Rec. Vol. 1, pages 93 and 93-A.)

	State of Minnesota	System Exclusive of Minnesota	Excess in Minnesota
Northern Pacific:			
Tons one mile per mile of road.....	1,103,082	875,342	227,740
Passengers one mile per mile of road...	154,903	138,051	16,852
Great Northern:			
Tons one mile per mile of road.....	1,033,482	674,516	358,966
Passengers one mile per mile of road...	89,732	68,855	20,877

The density of freight traffic in Minnesota was 26 per cent greater on the Northern Pacific, and 53 per cent greater on the Great Northern than on the rest of their lines; the density of passenger traffic on the Northern Pacific was 12 per cent greater, and on the Great Northern it was 30 per cent greater in Minnesota than on the rest of their lines.

The Interstate Rate System in This Territory Tested by the "Cardinal Principles" of Mr. Otis.

However, let us assume that Mr. Otis is correct as quoted above, that the conditions are substantially the same throughout this territory, that his "cardinal principles" are true, and see whether the state and interstate rates in effect prior to the action of the Minnesota authorities were, and the present interstate rates are, *in fact*, "equable and relatively just."

The tariffs filed with the Interstate Commerce Commission, which are thereby a part of the law of the land, naming the lawful rates which can be charged, will give us the rates, and Mr. Otis has given us the conditions. We will examine a few typical tariffs on a few representatives staple commodities, and on merchandise.

The first "cardinal principle" of Mr. Otis is that "a rate for a longer distance should be proportionately smaller than one for a shorter distance; that is to say," continues Mr. Otis, "that a rate for 500 miles should be less than twice the rate for 250 miles, if conditions of transportation be the same." The following concrete application of this doctrine is given by him: "For example, the present rate maintained by the Northern Pacific on class E, merchandise, from St. Paul to Miles City, 743 miles from St. Paul, is 39 cents per cwt.; the rate to Moorhead, based on the proportion of 39 cents, which the mileage haul in Minnesota is of the entire haul, is *13 cents*. The order allows only *11 cents* per cwt. from St. Paul to Moorhead, in which of course are included two full terminal charges. Maintaining rates comparison of which shows this result, involves substantial, undue and unjust discrimination in fact against the interstate localities." (Nor. Pac. Rec. Vol. 1, p. 204.) This is typical of a half dozen illustrations he gives, in different phraseology, in a half dozen or more pages.

Prior to the action of the Minnesota authorities the rate system in vogue showed the following situation:

On the Northern Pacific railroad running from Duluth Northwest, substantially the last 49 miles within Minnesota lies between Syre and Crookston, this haul added nothing to the rate from Duluth, the next fifty-three miles crossing the state line into North Dakota lies between Crookston and Gilby, on which haul the rate increased 7 cents. On the next 48 miles from Gilby, N. D., to Bowesmont, the rate increased 13 cents. "Maintaining rates comparison of which shows this result, involves substantial, undue and unjust discrimination in fact."

These fluctuations in the rates of progression are shown in the following table from Minnesota, west.

In 1905 the rates from St. Paul were to:

Bismarck, N. D.			100 cents		
Curlew, N. D.	52 miles farther,	114 cents	or an addition of	14 cents	
Gladstone, N. D.	52 miles farther,	125 cents	or an addition of	11 cents	
Medora, N. D.	51 miles farther,	134 cents	or an addition of	9 cents	
Hodges, Mont.	46 miles farther,	147 cents	or an addition of	13 cents	
Fallon, Mont.	50 miles farther,	161 cents	or an addition of	14 cents	
Fort Keough, Mont.	52 miles farther,	172 cents	or an addition of	11 cents	
Howard, Mont.	51 miles farther,	198 cents	or an addition of	26 cents	
Waco, Mont.	48 miles farther,	213 cents	or an addition of	15 cents	
Billings, Mont.	45 miles farther,	225 cents	or an addition of	12 cents	
Merrill, Mont.	57 miles farther,	230 cents	or an addition of	5 cents	
Mission, Mont.	51 miles farther,	234 cents	or an addition of	4 cents	
Sphinx, Mont.	49 miles farther,	250 cents	or an addition of	16 cents	
Whitehall, Mont.	47 miles farther,	250 cents	or an addition of	0 cents	
Stuart, Mont.	51 miles farther,	250 cents	or an addition of	0 cents	
Ubet, Mont.	52 miles farther,	270 cents	or an addition of	20 cents	
Bonner, Mont.	50 miles farther,	259 cents	or 11 cents *less*		
Woodside, Mont.	50 miles farther,	278 cents	or an addition of	19 cents	
De Borgia, Mont.	51 miles farther,	288 cents	or an addition of	10 cents	
Smeads, Mont.	51 miles farther,	285 cents	or 3 cents *less*		
Wrights, Idaho	50 miles farther,	300 cents	or an addition of	15 cents	

For the next 450 miles there is no addition.

We find here there was an almost hopeless lack of uniformity in the rate of progression in this territory where conditions were the same. "Maintaining rates comparison of which shows this result, involves substantial, undue and unjust discrimination in fact."

As illustrating the rate of progression under the new rates in North Dakota we call attention to the following first class rates from and to St. Paul. Valley City is 38 miles farther than Casselton, and the rate is 10 *cents higher* per hundred weight. Jamestown is 35 miles farther than Valley City while the rate is only 7 *cents higher*. Mc Kenzie is 25 miles farther than Steele while the rate is 6 *cents higher*. The next increase of 18 miles to Bismarck is accompanied by an increase in the rate of only 2 *cents*.

Under the rules of the Master these differences constitute unjust discrimination in fact.

On page 58 of Mr. G. W. Bunn's Brief on Behalf of Appellees, he commences a portion of his argument with this question: "Suppose a carrier obeys the State of Minnesota and puts in the rates it prescribed, would its doing so have any *necessary and direct* effect on the carriers' interstate rates, and if so what?" Then follows a discussion claiming to show how the rates would *necessarily* be projected beyond the state line. Also in support of this proposition he gives a plat marked "Plat D-1", which attempts to show a projection of the state rates beyond the state line which would necessarily follow the adoption of the state rates.

In the first place the record belies the claim that state rates have any material effect upon interstate rates, or that the rate of progression adopted within the state is required to be extended beyond the state line. As showing how little actual effect the state rates have on interstate rates the following two passages from the testimony of witnesses for the railroads have much significance:

STATE RATES DISREGARDED IN MAKING INTERSTATE RATES.

Mr. McGuire for the Great Northern, testified as follows:

"Q. Now, assuming that that is a correct tariff..... you know, do you not, that it has been maintained in the State of Iowa for several years?

A. Yes Sir.

Q. And utterly disregarded outside of Iowa?

A. Well, we have disregarded it.

Q. And so far as you know, every road has disregarded it. I think it already appears in evidence in this case, for instance, that the rates from Des Moines to Saint Paul are not established with regard to that tariff?

A. Yes, I think as a general rule it is disregarded. I want to correct that and state that the lines use the Iowa distance tariff as proportional interstate tariffs west of the river.

Q. You don't mean that they use the Iowa distance tariff as a basis for extending the rates outside of the State of Iowa?

A. I don't think they use the Iowa distance tariff as a basis for extending the rates outside of Iowa; no, sir." (Great Nor. Rec., p. 938).

Mr. Tittemore, Traffic Manager M. & St. L., testified:

Q. It would have some effect?

A. The effect of the reduction in itself.

Q. I am not speaking about the reduction in itself, but would it have any effect upon interstate tariffs. I am not talking about interstate revenues.

A. So far as our road is concerned, the effect would not be serious in the merchandise.

Q. Would it have any effect?

Mr. Durment: That is on interstate traffic?

A. It would not have much effect on it. We could ward against it.

Q. Would it have any effect, or compel a change in any interstate rate?

A. I am not prepared to say that it would not." (M. & St. L. Rec., p. 140.)

The absurdity of the claim that the rate of progression for any particular portion of a haul must necessarily be carried clear to the coast; and, on the contrary if that were true, the further fact that the former scheme of interstate rates was wholly unjust; both these facts are conclusively shown by the accompanying plat. Taking the carriers' own tariff sheets, Mr. D. F. Jurgensen of the staff of the Minnesota Commission has adopted the rate of progression for different portions of their interstate haul and projected each of these rates of progression to the coast. Instead of a steady uniformity, as claimed must exist and did in fact exist, so they say, prior to the Minnesota orders, we find such projections will produce eighteen different rates at the coast.

IN REPLY SPECIFICALLY TO PLATE D" ATTACHED TO BRIEF OF MR. BUNN.

— CHART ANALYZING COMPLAINANTS EXHIBIT #44 BAIRD - NOR. PAC. CASE. —

This Chart shows the different rates on Wheat to Spokane which would result if the present rates, actually maintained by the railway company to the various stations between St Paul and Spokane [being those shown in Subdivision B of said exhibit] were each extended to Spokane upon the principle adopted by complainants in attempting to extend the Minnesota schedule beyond the boundary of the State.

— EXAMPLE —

Rate to Wadena Jct	—	150 Miles	9.5 cents
" " Audubon	—	200 "	10.0 "
Amount added for 50 miles			0.5 "
St Paul to Audubon			10. "
Audubon to Spokane 1300 M. at ½ each 50 M.			13. "
TOTAL RATE St Paul to Spokane 1500 M.			23 cents

RED LINE - SHOWS RATES MAINTAINED BY N.P. Ry
GREEN LINES SHOW EXTENSION OF RATES

Minnesota
N. Dakota

N. Dakota
Montana

Montana
Idaho

Idaho
Washington

COMPILED BY D. F JURGENSEN

The second "cardinal principle" laid down by Mr. Otis is that if unjust and undue preference or advantage is to be avoided, like rates must exist for like distances under like circumstances. The conditions in Minnesota, North Dakota South Dakota and Montana are similar according to the findings of Mr. Otis. For transportation of first class merchandise from Devil's Lake, North Dakota, to Sprole, Montana, a distance of 318 miles, the rate is *$1.22 per hundredweight.* On first class merchandise from Minot, North Dakota to Beaverton, Montana, a distance of 311 miles, the rate is *$1.36 per hundredweight,* a difference of 14 cents per hundredweight for the same distance. "Such a disparity in rates without substantial dissimilarity in conditions constitutes undue and unjust discrimination in fact."

For transportation of first class merchandise from Grand Forks, North Dakota, to Bainville, Montana, a distance of 355 miles, the rate is $1.11 per hundredweight. While from Minot, North Dakota, to Dodson, Montana, a distance of 361 miles, the rate is $1.48 per hundredweight, a difference of *37 cents.* "Such a disparity in rates without substantial dissimilarity in conditions constitutes undue and unjust discrimination in fact."

For transportation of first class merchandise from Grand Forks, North Dakota, to Beaverton, Montana, a distance of 507 miles, the rate is *$1.73 per hundredweight;* while on first class merchandise from Minot, North Dakota, to Galata, Mont., a distance of 511 miles, the rate is *$1.92 per hundredweight,* a difference of 19 cents per hundredweight. "Such a disparity in rates without substantial dissimilarity in conditions constitutes undue and unjust discrimination in fact."

For transportation of merchandise, first class from Grand Forks, North Dakota, to Beaverton, Montana, a distance of 507 miles, the rate is *$1.64 per hundredweight;* while for similar transportation from Minot, North Dakota to Gildford, Montana, a distance of 460 miles, the rate is *$1.82 per hundredweight,* a difference of 18 cents per hundredweight. "Such a disparity in rates without dissimilarity in conditions constitutes undue and unjust discrimination in fact."

For transportation of first class merchandise from St. Paul to Bainville, Montana, a distance of 672 miles, the rate is *$1.48 per hundredweight;* while for the shorter distance of 656 miles from Grand Forks, North Dakota, to Gildford, Montana, the rate on first class merchandise is *$2.03 per hundredweight;* a difference in the rate of 55 cents per hundredweight. "Such disparity in rates without dissimilarity in conditions constitutes undue and unjust discrimination in fact."

For the transportation of first class merchandise from St. Paul to Sprole, Montana, a distance of 714 miles, the rate is *$1.53 per hundredweight;* while from Grand Forks, North Dakota, to Galata, Montana, a distance of 707 miles, the rate is *$2.10 per hundredweight,* a difference of 57 cents per hundredweight in the rate for the same service. "Such a disparity in rates without dissimilarity in conditions constitutes undue and unjust discrimination in fact."

The tariffs on practically any commodity will show the same situation. We will examine a tariff sheet on coal.

Prior to the taking effect of the orders of the Minnesota authorities in issue in this case, in 1905 the Northern Pacific Railway Company maintained a rate on coal and coke of *$2.50 per ton* for a haul of 270 miles from St. Paul to DeLamere, North Dakota. At the same time said company maintained a rate of *$2.20 per ton* on coal and coke from St. Paul to Davenport, North Dakota, a distance of 271 miles, making a difference in the rate of 30 cents a ton. "Such a disparity in rates without dissimilarity in conditions constitutes undue and unjust discrimination in fact."

Prior to the taking effect of said orders the said company maintained a rate on coal and coke of *$2.20 per ton* for a haul of 263 miles, from St. Paul to Mapleton, North Dakota; while at the same time the rate on coal and coke was *$2.40 per ton* for a haul of 260 miles from St. Paul to Bayne, North Dakota, making a difference in the rate of 20 cents per ton. "Such a disparity in rates without dissimilarity in conditions constitutes undue and unjust discrimination in fact."

Prior to the taking effect of said orders the said company maintained a rate on coal and coke of $2.20 per ton for a haul of 256 miles from St. Paul to Haggart, North Dakota; as opposed to the rate on coal and coke of $2.40 per ton from St. Paul to Warner, North Dakota, a distance of 258 miles, making a discrimination of 20 cents per ton. "Such a disparity in rates without dissimilarity in conditions constitutes undue and unjust discrimination in fact."

Prior to the taking effect of said orders the said company maintained a rate on coal and coke of $2.50 per ton for a haul of 288 miles from St. Paul to Fabian, North Dakota; as opposed to the rate on coal and coke of $2.35 per ton for a haul of 287 miles from St. Paul to Buffalo, North Dakota, making a discrimination of 15 cents per ton. "Such a disparity in rates without dissimilarity in conditions constitutes undue and unjust discrimination in fact."

Prior to the taking effect of said orders the said company maintained a rate on coal and coke of $2.40 per ton for a haul of 287 miles from St. Paul to Coburn, North Dakota; as opposed to the rate on coal and coke of $2.25 per ton for haul of 287 miles from St. Paul to Coburn, North Dakota; making a discrimination of 15 cents per ton. "Such a disparity in rates without dissimilarity in conditions constitutes undue and unjust discrimination in fact."

Prior to the taking effect of said orders the said company maintained a rate on coal and coke of $2.10 per ton for a haul of 280 miles from St. Paul to Kankel, Minnesota; as opposed to the rate on coal and coke of $2.30 per ton for a haul of 280 miles from St. Paul to Leonard, North Dakota, making a discrimination of 20 cents per ton. "Such a disparity in rates without dissimilarity in conditions constitutes undue and unjust discrimination in fact."

Prior to the taking effect of said orders the said company maintained a rate on coal and coke of $2.10 per ton for a haul of 283 miles from St. Paul to Harold, Minnesota; as opposed to the rate on coal and coke of $2.25 per ton for a haul of 284 miles from St. Paul to Embden, North Dakota, making

a discrimination of 15 cents per ton. "Such a disparity in rates without dissimilarity in conditions constitutes undue and unjust discrimination in fact."

Prior to the taking effect of said orders the said company maintained a rate on coal and coke of $2.10 per ton for a haul of 290 miles, from St. Paul to Crookston, Minnesota; as opposed to the rate on coal and coke of $2.50 per ton for a haul of 290 miles from St. Paul to Alice, North Dakota, making a discrimination of 40 cents per ton. "Such a disparity in rates without dissimilarity in conditions constitutes undue and unjust discrimination in fact."

Prior to the taking effect of said orders the said company maintained a rate on coal and coke of $2.10 per ton for a haul of 292 miles from St. Paul to Anglim, Minnesota; as opposed to the rate on coal and coke of $2.45 per ton for a haul of 293 miles from St. Paul to Tower City, North Dakota, making a discrimination of 35 cents per ton. "Such a disparity in rates without dissimilarity in conditions constitutes undue and unjust discrimination in fact."

Prior to the taking effect of said orders the said company maintained a rate on coal and coke of $2.10 per ton for a haul of 297 miles from St. Paul to Hixon, Minnesota; as opposed to the rate on coal and coke of $2.50 per ton for a haul of 299 miles from St. Paul to Oriska, North Dakota, making a discrimination of 40 cents per ton. "Such a disparity in rates without dissimilarity in conditions constitutes undue and unjust discrimination in fact."

Prior to the taking effect of said orders the said company maintained a rate on coal and coke of $2.10 per ton for a haul of 301 miles from St. Paul to Freeman's, Minnesota; as opposed to the rate on coal and coke of $2.50 per ton for a haul of 302 miles from St. Paul to Buttzville, North Dakota, making a discrimination of 40 cents per ton. "Such a disparity in rates without dissimilarity in conditions constitutes undue and unjust discrimination in fact."

Prior to the taking effect of said orders the said company maintained a rate on coal and coke of $2.10 per ton for a haul

of 307 miles from St. Paul to Davidson, Minnesota; as opposed to the rate on coal and coke of $2.50 per ton for a haul of 307 miles from St. Paul to Lisbon, North Dakota, making a discrimination of 40 cents per ton. "Such a disparity in rates without dissimilarity in conditions constitutes undue and unjust discrimination in fact."

Prior to the taking effect of said orders the said company maintained a rate on coal and coke of $2.10 per ton for a haul of 308 miles from St. Paul to Nesbit, Minnesota; as opposed to the rate on coal and coke of $2.50 per ton for a haul of 308 miles from St. Paul to Eastedge, North Dakota, making a discrimination of 40 cents per ton. "Such a disparity in rates without dissimilarity in conditions constitutes undue and unjust discrimination in fact."

Prior to the taking effect of said orders the said company maintained a rate on coal and coke of $2.10 per ton for a haul of 247 miles from St. Paul to Dilworth, Minnesota; as opposed to the rate on coal and coke of $2.40 per ton for a haul of 248 miles from St. Paul to Mooreton, North Dakota, making a discrimination of 30 cents per ton. "Such a disparity in rates without dissimilarity in conditions constitutes undue and unjust discrimination in fact."

Prior to the taking effect of said orders the said company maintained a rate on coal and coke of $2.10 per ton for a haul of 250 miles from St. Paul to Moorhead, Minnesota; as opposed to the rate on coal and coke of $2.30 per ton for a haul of 251 miles from St. Paul to Woodruff, North Dakota, making a discrimination of 20 cents per ton. "Such a disparity in rates without dissimilarity in conditions constitutes undue and unjust discrimination in fact."

Prior to the taking effect of the orders of the Minnesota authorities, the Northern Pacific maintained a rate on first class merchandise of 35 cents per cwt. from Duluth to North Branch, Minnesota, a distance of 111 miles; while at the same time the rate from Duluth to Jonesville, Minnesota, for the same distance under the same conditions, the rate was 44 cents per cwt., a discrimination of 9 cents. "Such a disparity

in rates without dissimilarity in conditions constitutes undue and unjust discrimination in fact."

Prior to the taking effect of the orders of the Minnesota authorities, the Northern Pacific maintained a rate on first class merchandise of 35 cents per cwt. from Duluth to Lindstrom, Minnesota, a distance of 132 miles; while at the same time the rate from Duluth to Pillager, Minnesota, for the same distance under the same conditions the rate was 47 cents per cwt., a discrimination of 12 cents. "Such a disparity in rates without dissimilarity in conditions constitutes undue and unjust discrimination in fact."

Prior to the taking effect of the orders of the Minnesota authorities, the Northern Pacific maintained a rate on first class merchandise of 35 cents per cwt. from Duluth to Anoka, Minnesota, a distance of 179 miles; while at the same time the rate from Duluth to Spaulding, Minnesota, for the same distance under the same conditions the rate was 50 cents per cwt., a discrimination of 15 cents per cwt. "Such a disparity in rates without dissimilarity in conditions constitutes undue and unjust discrimination in fact."

Prior to the taking effect of the orders of the Minnesota authorities, the Northern Pacific maintained a rate on first class merchandise of 35 cents per cwt. from Duluth to Elk River, Minnesota, a distance of 191 miles; while at the same time the rate from Duluth to Stiles, Minnesota, for 190 miles under the same conditions the rate was 52 cents per cwt., a discrimination of 17 cents. "Such a disparity in rates without dissimilarity in conditions constitutes undue and unjust discrimination in fact."

The illustrations we give are not exceptions. They are picked out at random in a few tariff sheets showing rates on one or two staple commodities, which are full of equal injustices. We will here insert two or three copies made directly from the tariff sheets we have used, and leave it to the court, if it so desires, to pick out more examples of this character, (both as to the rates for similar distances and rates of

progression, used by the railroads), for they are there in abundance.

RATES ON LUMBER, LATH AND SHINGLES

Between St. Paul, and—	Distance	Rate in cents per 100 lbs.
Milnor, North Dakota	276	19
Gwinner, North Dakota	287	19
Stirum, North Dakota	294	19
Crete, North Dakota	301	19½
Janet, North Dakota	305	20
Oakes, North Dakota	309	20
Nada, Minnesota	224	15
Twin Valley, Minnesota	247	15½
Fertile, Minnesota	267	15½
Melvin, Minnesota	275	15½
Kankel, Minnesota	280	15½
Crookston, Minnesota	290	15½
Anglim, Minnesota	292	15½
Hixon, Minnesota	297	15½
Freeman's Minnesota	301	15½
Davidson, Minnesota	307	15½
Nesbit, Minnesota	308	15½
Cummings, Minnesota	309	15½
Lees, Minnesota	273	15½
Tilden, Minnesota	279	15½
Delorme, Minnesota	283	15½
Perault, Minnesota	296	15½
Red Lake Falls, Minnesota	291	15½
Hilltop, Minnesota	294	15½
Dorothy, Minnesota	299	15½
South Euclid, Minnesota	308	15½
Buffington, Minnesota	311	15½
Key West, Minnesota	315	15½
Sherack, Minnesota	321	15½
Walkerton, Minnesota	318	15½
Carthage, Minnesota	321	15½

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RATES ON LUMBER, LATH AND SHINGLES—CONTINUED

Between St. Paul and—	Distance	Rate in cents per 100 lbs.
Fargo, North Dakota	251	15½
Cotter's, North Dakota	255	18½
Osgood, North Dakota	257	18½
Horace, North Dakota	262	18½
Davenport, North Dakota	271	19
Woods, North Dakota	277	19
Leonard, North Dakota	280	19
Coburn, North Dakota	287	19½
Sheldon, North Dakota	293	19½
Buttzville, North Dakota	302	20
Lisbon, North Dakota	307	21
Elliott, North Dakota	315	21
Englevale, North Dakota	320	21½
Verona, North Dakota	328	22
Oakes Jct., North Dakota	334	22
La Moure, North Dakota	339	23
Berlin, North Dakota	350	23
Reeves' Spur, North Dakota	351	23
Haggart, North Dakota	256	16
Mapleton, North Dakota	263	16½
Greene, North Dakota	266	18
Dalrymple, North Dakota	269	19
Casselton, North Dakota	271	19
Langers, North Dakota	273	19½
Persis, North Dakota	275	19½
Myra, North Dakota	277	19½
Embden, North Dakota	284	20
Fabian, North Dakota	288	20
Alice, North Dakota	290	20
Elizabeth, North Dakota	296	20
Lucca, North Dakota	299	20
Nome, North Dakota	304	20½
Eastedge, North Dakota	308	21
Kathryn, North Dakota	312	22

RATES ON LUMBER, LATH AND SHINGLES—CONTINUED

Between St. Paul and—	Distance	Rate in cents per 100 lbs.
Hastings, North Dakota	319	22½
Litchville, North Dakota	324	22½
Marion, North Dakota	331	23
Wheatland, North Dakota	278	20
Magnolia, North Dakota	282	20
Buffalo, North Dakota	287	20½
Tower City, North Dakota	293	21
Oriska, North Dakota	299	21½
Alta, North Dakota	304	22
Gorman, North Dakota	305	22
Valley City, North Dakota	309	22
Berea, North Dakota	314	22
Hobart, North Dakota	316	22
Sanborn, North Dakota	320	22
Rogers, North Dakota	330	22

WESTERN CLASSIFICATION.

1905 Miles	1905 Distance from Duluth	Rate in Cents per Cwt. Class 1	2	3	4	5	A	B	C	D	E
49	Cromwell	30	26	20	15	12	12	11	9	7	6
101	Deerwood	42	36	28	21	17	17	15	13	10	8
150	Duclos Spur	50	43	33	25	20	20	18	15	12	10
201	Villard	56	48	37	28	22	22	20	17	13	11
250	Syre	67	57	44	34	27	27	23	20	16	13
299	Crookston	67	57	44	34	27	27	23	20	16	13
352	Gilby, N. D.	74	63	49	37	30	30	26	22	18	15
400	Bowesmont, N. D.	87	74	57	44	35	35	30	26	21	18
451	Bismarck, N. D.	100	85	67	51	41	40	35	30	25	20
503	Curlew, N. D.	114	97	78	63	50	49	43	38	30	26
555	Gladstone, N. D.	125	106	87	71	59	55	49	43	35	30
606	Medora, N. D.	134	114	94	80	67	61	53	48	40	34
652	Hodges, Mont.	147	122	102	89	77	69	59	54	48	39
702	Fallon, Mont.	161	133	113	99	87	77	67	60	54	44
754	Fort Keough, Mont.	172	146	125	108	95	85	75	66	58	48
805	Howard, Mont.	198	172	143	126	105	91	80	70	62	51
853	Waco, Mont.	213	187	152	132	111	98	87	77	66	56
898	Billings, Mont.	225	195	158	140	115	105	93	83	68	58
955	Merrill, Mont.	230	200	162	142	117	107	95	85	70	60
1006	Mission, Mont.	234	204	164	144	119	109	97	87	72	62
1054	Sphinx, Mont.	250	215	175	150	125	115	100	90	75	65
1101	Whitehall, Mont.	250	215	175	150	125	115	100	90	75	65
1152	Stuart, Mont.	250	215	175	150	125	115	100	90	75	65
1204	Ubet, Mont.	270	235	195	170	138	128	113	103	88	78
1254	Bonner Mont.	259	224	183	158	129	119	104	94	79	69
1282	Missoula, Mont.	260	225	185	160	130	120	106	95	80	70
1304	Woodside, Mont.	278	239	199	173	140	135	115	105	88	78
1355	De Borgia, Mont.	288	253	211	182	143	141	118	104	89	79
1406	Smeads, Mont.	285	248	208	181	146	135	118	106	91	81
1456	Wrights, Idaho	300	260	220	190	150	145	125	110	95	85
1503	Port Falls, Idaho	300	260	220	190	150	145	125	110	95	85
1555	Rosalia, Wash.	300	260	220	190	150	145	125	110	95	85
1604	Pullman, Wash.	300	260	220	190	150	145	125	110	95	85
1657	Glade, Wash.	300	260	220	190	150	145	125	110	95	85
1706	Lee, Wash.	300	260	220	190	150	145	125	110	95	85
1752	Coppel, Wash.	300	260	220	190	150	145	125	110	95	85
1802	Dudley, Wash.	300	260	220	190	150	145	125	110	95	85
1854	Lester, Wash.	300	260	220	190	150	145	125	110	95	85
1903	Melmont, Wash.	300	260	220	190	150	145	125	110	95	85

Authorities for rates quoted above:

Rates on coal and coke: Nor. Pac. 13402, I. C. C. No. A-2077, effective, September 10, 1903, to Oct. 22, 1906.

First class rates in Minnesota prior to action of Minnesota authorities: Nor. Pac. 16900, I. C. C. A-2470, effective Feb. 1,

1905. Nor. Pac. 18000, I. C. C. A-2525, effective, June 26, 1905.

Rates on lumber, lath and shingles: Nor. Pac. Ry. 13400, I. C.C. No. 2075, effective, Sept. 10, 1903.

Rates on classes from Western points to Duluth, 1905-1907: Nor. Pac. 18000, I. C. C. A-2525, effective, Jan. 26, 1905 to Nov. 28, 1907. Nor. Pac. 14800, I. C. C. No. 2245, effective, April 15, 1904 to Aug. 15, 1906.

Present interstate rates from Grand Forks, Devils Lake, Minot and St. Paul, on the Great Northern to points in North Dakota and Montana on first class merchandise: Grt. Nor. 22600, I. C. C. A-3400, effective, July 25, 1911. Nor. Pac. 22,500, I. C. C. No. A-3070.

CHANGES IN RATES.

It would appear from the argument of Mr. Holden and his associates, as reflected in the decision of the lower court, that a reduction in the rates to one point must be carried on to others, clear to the coast, that our rate system is one ideal, logically framed and put together, vast, complicated, closely knit fabric, which must rise and fall together; no change in any part shall be permitted without a corresponding change in every other part. The history of the workings of these very carriers themselves disproves all such argument. There is no such uniformity in the rate changes in this territory and there never has been. Consider a few concrete illustrations.

The distance from St. Paul to a few representative points in Minnesota, North Dakota, Montana and Idaho are as follows: Brainerd, Minn., 138 miles; Detroit, Minn., 204 miles; Fargo, North Dakota, 242 miles; Jamestown, North Dakota, 344 miles; Bismarck, North Dakota, 445 miles; Dickinson, North Dakota, 560 miles; Glendive, Montana, 666 miles; Billings, Montana, 891 miles; Bozeman, Montana, 1032 miles; Helena, Montana, 1130 miles; Missoula, Montana, 1254 miles; Thompson Falls, Montana, 1356 miles, and Hope, Idaho, 1427 miles.

In 1887 the rate on first class merchandise from St. Paul to Brainerd, Minnesota, was 58 cents per cwt.; in 1890 it was 49

cents per cwt., thus dropping 9 cents. During the same period the similar rate to Fargo, North Dakota, dropped 20 cents; the rate to Dickinson, North Dakota, declined 31 cents; the rate to Glendive, Montana, declined 47 cents; the rate to Bozeman, Montana, declined 50 cents; the rate to Missoula, Montana, declined 65 cents; the rate to Thompson Falls, Montana, declined 85 cents; and the rate to Hope, Idaho, declined $1.08.

Between 1890 and 1895 the rate on merchandise, first class, from St. Paul to Thompson Falls declined 18 cents, and to Hope, Idaho, it declined 29 cents; while the rates remained absolutely stationary to all the other places named above.

Between 1900 and 1905 the rate on merchandise, first class, from St. Paul to Brainerd, Minnesota, declined 4 cents; to Fargo, North Dakota, it declined 13 cents; to Jamestown, North Dakota, it declined 9 cents; to Bismarck, North Dakota, it declined 20 cents; to Dickinson, North Dakota, it declined 15 cents; while the said rates to Glendive, Montana, Billings, Montana, Bozeman, Montana, Helena, Montana, Missoula, Montana, Thompson Falls, Montana, and to Hope, Idaho, remained absolutely stationary.

While these fluctuations in rates were going on at Brainerd, Minnesota, Detroit, Minnesota, Fargo, North Dakota, Jamestown, North Dakota, Bismarck, North Dakota, Dickinson, North Dakota, Thompson Falls, Montana, and Hope, Idaho, we find that during the fifteen years from 1890 to 1905 the rates on merchandise, first class, from St. Paul did not change one iota to Glendive, Montana, Billings, Montana, Bozeman, Montana, Helena, Montana or Missoula, Montana.

Between 1905 and 1911 the rates on merchandise, first class, from St. Paul remained the same to Brainerd, Minnesota, Detroit, Minnesota, Fargo, North Dakota, Jamestown, North Dakota, Bismarck, North Dakota, and Dickinson, North Dakota; while they declined to Glendive Montana, 6 cents; to Billings, Montana, 30 cents; to Bozeman, Montana, 30 cents; to Helena, Montana, 25 cents; to Missoula, Montana, 24 cents;

to Thompson Falls, Montana, 27 cents, and to Hope, Idaho, 43 cents.

The uniformity in these changes in this ideal system of rates is clearly the product of the imagination.

During the past 24 years the total decline of rates on merchandise, first class, from St. Paul has been: to Brainerd, Minnesota, 13 cents; to Detroit, Minnesota, 26 cents; to Jamestown, North Dakota, 34 cents; to Billings, Montana, 68 cents; to Bozeman, Montana, 80 cents; to Helena, Montana, 75 cents; to Missoula, Montana, 89 cents; to Thompson Falls, $1.30; and to Hope, Idaho, $1.80. Perhaps it is time for the Minnesota rates to make up some of their share of these great reductions to Western points, in order that the former basis of rates, upon which towns and localities have been built up, may be restored.

Following the precedent set by Mr. Otis and Judge Sanborn it would be entirely legitimate to devote a paragraph or a half page to each change at each point when there was not a like change to each other point, with a striking climax at the end of each illustration to the effect that the failure to reduce the other rate to a substantial parity with the former basis caused undue and unjust prejudice and disadvantage in fact against shippers and localities where such reductions were not made.

The foregoing figures demonstrate that during the past 25 years there has been a constant fluctuation in these rate relationships between the towns in Minnesota, North Dakota, Montana and Idaho; they demonstrate that there never has been a hard and fixed basis existing in said system of rates. The claim that the scheme of rates between these Northwestern cities has been so delicately balanced and intricately interwoven that whenever a change has been made at one place it has been reflected from distributing point to distributing point clear to the coast is a dream, a myth. It has never existed and will not exist for many decades to come. During these formative years, as this country gradually settles up, there

will be many changes from time to time. The day is fast coming when these changes will not be so violent and haphazard as evidenced by the foregoing figures. The day must come when governmental authority will compel justice to all and not leave these matters to the whim of one of the interested parties. Up to this time the Interstate Commerce Commission, with its vast duties over the entire nation, has scarcely been felt in all this great territory we have been considering. During these years while the Federal Commission will be wrestling with its great problems, trans-continental rates, general advances, long hauls, etc., etc., the state commissions have important work to perform, in connection with smaller matters it is true, but with important matters nevertheless, for the local haul, the short haul, must be fair and just. The reasonable local haul covers a smaller territory, where conditions are generally more uniform, and the resulting problems are less difficult to handle.

The illustrations given above apply to first class merchandise, but they are typical of all other rates. In order to show the entire scheme of class rates to these points during the past 24 years we here produce a table showing the same in detail.

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COMPARISON OF LOCAL FREIGHT RATES CHARGED BY THE NORTHERN PACIFIC RAILWAY BETWEEN ST. PAUL, MINNEAPOLIS, OR DULUTH, MINN., AND STATIONS NAMED DURING 1887, 1890, 1895, 1900, 1905, 1911.

(Governed by Western Classification; 1887, 1890, 1895, 1900, 1905 and 1911.)

Distance from St. Paul—miles	Between St. Paul, Minneapolis, or Duluth, Minn., and—	Year	Classes—(Rates in Cents per 100 Pounds) Western Classification									
			1	2	3	4	5	A	B	C	D	E
138	Brainerd, Minn.	1887	58	49	41	35	29	23	19	17	12	10
		1890	49	42	32	25	20	20	17	15	12	10
		1895	49	42	32	25	20	20	17	15	12	10
		1900	49	42	32	25	20	20	17	15	12	10
		1905	45	38	30	23	18	18	16	14	11	9
	From St. Paul	1911	45	38	30	23	18	18	16	14	11	9
	From Duluth	1911	44	37	29	22	18	18	15	13	11	9
204	Detroit, Minn.	1887	85	72	60	51	43	34	27	22	17	14
		1890	69	59	45	35	28	28	24	21	17	14
		1895	69	59	45	35	28	28	24	21	17	14
		1900	69	59	45	35	28	28	24	21	17	14
		1905	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
		1911	59	50	39	30	24	24	21	18	14	12
242	Fargo, N. Dak.	1887	100	85	70	60	45	40	32	26	20	16
		1890	80	68	52	40	32	32	28	24	20	16
		1895	80	68	52	40	32	32	28	24	20	16
		1900	80	68	52	40	32	32	28	24	20	16
		1905	67	57	44	34	27	27	23	20	16	13
		1911	67	57	44	34	27	27	23	20	16	13
344	Jamestown, N. Dak.	1887	120	102	84	72	55	48	38	31	24	19
		1890	95	81	62	48	38	38	33	29	24	19
		1895	95	81	62	48	38	38	33	29	24	19
		1900	95	81	62	48	38	38	33	29	24	19

COMPARISON OF LOCAL FREIGHT RATES CHARGED BY THE NORTHERN PACIFIC RAILWAY BETWEEN ST. PAUL, MINNEAPOLIS, OR DULUTH, MINN., AND STATIONS NAMED, DURING 1887, 1890, 1895, 1900, 1905, 1911.

(Governed by Western Classification; 1887, 1890, 1895, 1900, 1905 and 1911.)

St. Paul—miles Distance from	Between St. Paul, Minneapolis, or Duluth, Minn., and—	Year	Classes—(Rates in Cents per 100 Pounds) Western Classification									
			1	2	3	4	5	A	B	C	D	E
		1905	86	73	57	43	34	34	30	26	21	17
		1911	86	73	57	43	34	34	30	26	21	17
445	Bismarck, N. Dak.	1887	140	119	98	84	70	65	50	45	40	32
		1890	120	102	84	72	60	48	42	36	30	24
		1895	120	102	84	72	60	48	42	36	30	24
		1900	120	102	84	72	60	48	42	36	30	24
		1905	100	85	67	51	41	40	35	30	25	20
		1911	100	85	67	51	41	40	35	30	25	20
560	Dickinson, N. Dak.	1887	173	146	119	103	88	83	68	61	51	43
		1890	142	115	96	85	74	64	55	50	44	36
		1895	142	115	96	85	74	64	54	50	44	36
		1900	142	115	96	85	74	62	54	48	42	34
		1905	127	108	88	73	60	56	50	44	36	31
		1911	127	108	88	73	57	56	50	44	36	30
666	Glendive, Mont.	1887	202	170	138	119	103	98	83	73	59	52
		1890	155	126	106	94	83	73	63	57	52	42
		1895	155	126	106	94	83	73	63	57	52	42
		1900	155	126	106	94	83	73	63	57	52	42
		1905	155	126	106	94	83	73	63	57	52	42
		1911	149	127	104	89	75	76	60	52	45	37
891	Billings, Mont.	1887	263	219	176	152	133	130	115	99	76	69
		1890	225	195	158	135	115	100	85	75	65	55
		1895	225	195	158	140	115	105	93	83	68	58

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		1900	225	195	158	140	115	105	93	83	68	58
		1905	225	195	158	140	115	105	93	83	68	58
		1911	195	165	135	117	98	98	78	68	50	40
1032	Bozeman, Mont.	1887	300	250	200	175	160	150	135	125	100	.....
		1890	250	215	175	145	125	110	92	82	72	62
		1895	250	215	175	150	125	115	100	90	75	65
		1900	250	215	175	150	125	115	100	90	75	65
		1905	250	215	175	150	125	115	100	90	75	65
		1911	220	187	154	132	110	110	88	77	55	44
1130	Helena, Mont.	1887	300	250	200	175	160	150	135	125	100	.....
		1890	250	215	175	145	125	110	92	82	72	62
		1895	250	215	175	150	125	115	100	90	72	65
		1900	250	215	175	150	125	115	100	90	75	65
		1905	250	215	175	150	125	115	100	90	75	65
		1911	225	190	158	135	113	113	90	80	55	45
1254	Missoula, Mont.	1887	325	275	225	200	180	170	150	135	110	.....
		1890	260	225	185	155	135	120	102	87	77	67
		1895	260	225	185	160	130	120	105	95	80	70
		1900	260	225	185	160	130	120	105	95	80	70
		1905	260	225	185	160	130	120	105	95	80	70
		1911	236	201	165	142	118	118	94	83	59	47
1356	Thompson Falls, Mont.	1887	380	319	253	220	200	185	168	145	118	.....
		1890	295	253	208	172	152	141	135	114	92	79
		1895	277	241	201	174	141	131	114	103	88	78
		1900	277	241	201	174	141	131	114	103	88	78
		1905	277	241	201	174	141	131	114	103	88	78
		1911	250	217	179	154	128	128	102	83	64	51
1427	Hope, Idaho	1887	430	362	286	228	212	197	178	155	125	.....
		1890	322	277	230	186	166	163	146	123	102	84
		1895	293	253	213	186	148	140	122	107	92	82
		1900	293	253	213	186	148	140	122	107	92	82
		1905	293	250	213	186	148	140	122	107	92	82
		1911	250	217	183	158	133	133	104	83	78	63

Authorities: A review of changes in Freight Rates, prepared by the Auditor of the Interstate Commerce Commission, 1903; Nor. Pac. Ry. No. 14800, I. C. C.—No. A—2245. N. P. 500-B-I. C. C.-4339; N. P. 413-C-I. C. C. 4690.

We have given many concrete illustrations demonstrating that if Special Master Otis' assumptions are correct as to the similarity of conditions in this territory, and as to his "cardinal principles", then the present interstate rates are, and the former state and interstate rates in this territory prior to the action of the Minnesota authorities, were teeming with unjust discriminations in fact. It is perhaps not too much to say that "no such array of condemnatory facts" was ever before submitted to any court, and that no case has been found in the books in which there was any such unjust condition of rates proved, as existed in this territory prior to the action of the Minnesota authorities. The proof of this situation has been supplied to us by the record in this case. Mr. Otis himself summarizes the evidence as to the conditions, and the tariffs of the companies, on file with the Interstate Commission, which are in fact a part of the law of the land, furnish us with the rates.

Any assertion that these interstate and state rates were "equable and relatively just" is a figment of the imagination. It was time for some government authority to act. These injustices would probably have gone on many decades to come, had it not been for the courage and industry and great ability of the Minnesota authorities. They have done as much to remedy the situation as lay in their power. It remains for other state commissions and the Interstate Commerce Commission to continue the good work inaugurated by the Minnesota officials in bringing order out of chaos in the rate system of this, our great empire of the Northwest.

If conditions are the same in this territory and the rates for so many years have been equitably adjusted then the rates for the same distances should be the same, rates for longer distances should gradually and proportionately decline, and no change should be made in any part of this rate system at any time without a corresponding relative adjustment in the

rest. Their own tariff sheets have shown the opposite of this to be true; we have found that rates for the same distances are not the same, that rates do not grade down gradually, and that important changes and readjustments have frequently been made without re-casting the entire scheme of rates. These facts prove two things: 1st, that in the eyes of their own traffic men conditions in this territory are not the same (this is also thoroughly established by the facts given on page 115; and 2d, there is not and never has been a fixed, settled, delicately balanced, adjustment of rates throughout this territory, each dependent upon the rest in one vast scheme of rates which must rise and fall together; such an ideal condition of the interstate rate system in this territory is a myth.

If conditions are the same throughout this territory, as Mr. Otis has stated, and if his "cardinal principles" as to the essentials of reasonable and just rates are true, then we must conclude that the former state and interstate rates in this territory were not equable and relatively just, and that the present interstate rates in this territory are not equable and relatively just; and therefore that *the said rates form no standard whatsoever by which to test the Minnesota rates.* A change in the rates local to Minnesota need not necessarily be the cause of unjust discriminations; said discriminations may be the result of unduly high and unreasonable interstate rates, depending primarily upon this question: Are the proposed Minnesota rates in themselves too high or too low, *are the new Minnesota rates reasonable*—a question which forms the theme for the balance of the lower court's decision, and for our comments upon the same.

PART II.

WHERE A CONFLICT IN OPINION AS TO FACTS, NOT AS TO SOME FUNDAMENTAL LEGAL PROPOSITION, EXISTS BETWEEN THE LEGISLATIVE TRIBUNAL AND THE LOWER COURT, THE CONCLUSION OF THE LEGISLATIVE TRIBUNAL SHOULD CONTROL, PROVIDING THE COURT FINDS IT POSSIBLE THAT A FAIR-MINDED PERSON MIGHT HAVE REACHED THE SAME CONCLUSION.

THE LOWER COURT'S DECISION, AND THE MASTER'S FINDINGS, SHOULD HAVE BEEN DIRECTED TO FLAGRANT ERRORS IN THE RULES OR METHODS FOLLOWED BY THE MINNESOTA COMMISSION AND LEGISLATURE AS TO FUNDAMENTAL MATTERS; IF NONE SUCH EXIST, THEN THE CONCLUSIONS OF THE SAID TRIBUNALS MUST STAND; UPON THE OTHER HAND, IF SUCH ERRONEOUS METHODS OF INVESTIGATION WERE PURSUED, OR FUNDAMENTALLY WRONG LEGAL PRINCIPLES WERE ADOPTED BY THE SAID TRIBUNALS, THAT THEY FAILED TO CONSIDER FACTS WHICH SHOULD HAVE BEEN CONSIDERED, OR REACHED CONCLUSIONS WHICH A FAIR MINDED PERSON COULD NOT HAVE ARRIVED AT, THEN THE DECISIONS OF THE LOWER COURT SHOULD BE REVERSED, AND THE CASES SHOULD BE REFERRED BACK WITH ORDER OF COURT AS TO THE CORRECT LEGAL METHODS AND PRINCIPLES TO BE FOLLOWED. ONLY IN THIS WAY CAN THE PROPER FUNCTIONS OF COURTS AND LEGISLATIVE TRIBUNALS BE PRESERVED.

The true functions of a legislative tribunal, and its relation to the Courts, are the next questions of pre-eminent importance which confront us.

The public is entitled to the conclusions of the Commission, in the first instance, upon facts which they should consider. If upon the examination of the record anew, this Court should determine that the Minnesota Railroad & Warehouse Commission or the Minnesota legislature failed to pursue proper methods of investigation, and did not take into consideration all the circumstances and conditions upon which a legitimate order or statute could be founded, the decision of Judge Sanborn should be reversed, and the cases remanded with instructions in accordance with the conclusions of this Court as to what are the correct legal principles, and methods of investigation to be followed. This is in harmony with what appeals

to us as the eminently fair and proper rule concerning the conclusions of a legislative tribunal, which has been adopted by the Court in the case of *Texas & P. Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 238, and other cases which will be discussed later.

The governor with his veto power is a part of the legislative branch of the government. When the members of the legislature and the governor have both acted, that part of the government has fulfilled its functions. The judicial branch has duties to perform entirely different from those of the legislature.

There are many puzzling questions involved in connection with the weight to be given to the conclusions of a legislative tribunal, chief among these is what amount of profit must remain above expenses in order to escape the rule that the orders are confiscatory, in violation of the Constitution of the United States.

Recent decisions of federal courts in many cases during the past few months seem to indicate that these judges have wholly misconceived the true relative functions of courts and commissions as interpreted by the former decisions of the Supreme Court. This has been so generally prevalent throughout the country, and it strikes at matters so basic to this case, and to all others of a like character, that we have undertaken a careful review of practically all the important precedents bearing upon this issue.

NOT ONCE IN THE ENTIRE HISTORY OF THE LITIGATION RELATIVE TO THE MAKING OF MAXIMUM RATES BY A LEGISLATURE, OR A LEGISLATIVE TRIBUNAL HAVING FULL POWER TO ACT, HAS THIS COURT EVER HELD RATES TO BE UNCONSTITUTIONAL WHICH ALLOWED SOME PROFIT OVER AND ABOVE NECESSARY AND REASONABLE EXPENSES; PROVIDING: FIRST, THAT FRAUD WAS ABSENT FROM THE PROCEEDING; SECOND, THAT PROPER METHODS OF INVESTIGATION HAD BEEN MADE, INCLUDING THE GRANTING OF A FULL HEARING TO ALL INTERESTED PARTIES; AND THIRD, THAT THE DECISION WAS NOT SO

FLAGRANTLY UNREASONABLE THAT A FAIR-MINDED BODY OF MEN MIGHT NOT HAVE REACHED THE SAME CONCLUSION.

This class of cases is fraught with a multitude of questions where opinion is the determining factor. And it is not the opinion of the Master, nor of the District, nor of the Circuit Judge which is controlling. Upon the other hand, there is just one class of tribunals which the public, including both the railroads and shippers, must look to for protection in these questions. That tribunal is the legislature, or the commission created by the legislature for that purpose. The conclusions of this tribunal on matters of opinion are controlling on this and all other courts.

In the case at bar it would seem that the Circuit Court made a recast of the entire case, framing a new set of opinions and conclusions of fact, entirely regardless of the conclusions reached by the Minnesota legislature and Commission, giving no more heed to their conclusions than if they had been parties to an ordinary lawsuit, instead of tribunals whose conclusions on such questions must be binding upon the courts.

The condition of the law as stated above is not new. It has been on our statute books, and so interpreted by our courts of last resort during the past forty-four years. These railroads were built knowing that to be the law.

The conclusiveness of the Commission's findings and the acts of the legislature is so vital and fundamental to this entire controversy that we propose to make a somewhat exhaustive review of the cases involving this proposition.

It is quite generally conceded that when any given rate which has been fixed by a tribunal having legislative functions, does not yield any profit, but compels the company involved to suffer a loss, then such a rate may be set aside by the courts as confiscatory.

This proposition seems quite safe and is very frequently referred to by the courts in almost identically those words, and yet even this doctrine has some very pronounced exceptions,

for instance, Justice Brewer (1906), speaking of a rate fixed by a State Commission, said:

> "It is not bound to inquire whether it furnishes adequate return to the railway company, for the State may insist upon equality, to be enforced under the same conditions against all who perform a public or quasi public service." *Alabama, etc., Ry. Co. v. R. R. Commission of Mississippi,* 203 U. S., 496.

Another example which constitutes an exception to the doctrine as stated is where there has been mismanagement and extravagance in the original construction of the property which will prevent the owners receiving profits on their investment. *San Diego Land and Town Co. v. Jasper* (1903), 189 U. S. 439. But ordinarily the principle as stated is true.

A more complicated problem arises when the rate is not confiscatory, but yields a small profit, or when the question is so perplex that the conclusions reached as to value, earnings, expenses, rate of return, etc., must be pure matters of opinion, approximations towards the truth, as occurs in the vast majority of this class of cases.

There is little disposition on the part of any person to question the authority of the courts to set aside a rate which, in fact, yields no profit above legitimate expenses, under ordinary conditions.

The conflict arises, as in the cases pending, concerning the proper methods of accounting and making valuations, and finally when the conclusions are reached and some profit is secured, as to who is going to have authority to determine whether or not that profit is adequate. We have one decision in 1877 stating:

> "As to the claim that the courts must decide what is reasonable, and not the legislature. This is not new to this case. It has been fully considered in *Munn v. People of Illinois.* Where property has been clothed with a public interest, the legislature may fix a limit to that which shall in law be reasonable for its use. This limit binds the Court as well as the people. If it has been improperly fixed, the legislature, not the courts, must be appealed to

for the change." *Peik, v. Chicago & N. W. Ry. Co.*, 94 U. S. 164.

And on the other hand we have the following from the same tribunal, in 1890:

> "The question of the reasonableness of a rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination." *Chicago M. & St. P. Ry Co. v. Minnesota*, 134 U. S. 418.

Is it possible to reconcile these conflicting decisions? Did the Supreme Court completely change its position? Or is there some way to find consistency and harmony in the decisions?

The consideration of this question by the Supreme Court of the United States runs through a long series of cases for the last thirty-four years, and presents some memorable events in legal history.

Today this topic is befogged with a veritable network of dicta of all kinds and character. There is probably hopeless disagreement upon this topic in the decisions of the lower courts. But in spite of this medley of contradictory opinions a careful review of the decisions of the Supreme Court will show that there is a thread of absolute consistency running through the entire series of important decisions of this Court of last resort, which is supported by sound public policy, and is based upon well-considered case law in its true interpretation, as well as its most technical application. In order to determine the present status of the law on this question we cannot take isolated passages here and there, or even single cases by themselves. We can make no exception of this topic, we must follow the usual methods. We must ascertain what was in issue when the various phrases were used, and we must read those clauses in close connection with the context. We must also follow the trend of the decisions, if we hope to reach any intelligent conception as to the situation.

This question as to the conclusive character of the Commission's findings, lying, as it does, at the very basis and founda-

tion of this case, and all others analogous to it, justifies a most careful review of the former decisions of this Court upon that issue.

The development of our law as to the power of the legislature and the courts in fixing rates to be charged by the public service corporations is practically the history of one case. The main decision in this portion of our law, from which practically all these doctrines have evolved, is the celebrated opinion in *Munn v. Illinois* (94 U. S. 113), rendered March 1, 1877. Realizing the vast importance of the matter under consideration the Supreme Court retained this case over a year after it was argued, before rendering any decision, for the specific purpose of giving it their "mature deliberations." The State Legislature of Illinois had fixed maximum charges for the storage of grain in Chicago and other places having a population of over one hundred thousand. This action was contested, on the ground that it was unconstitutional, being beyond the scope of legislative activity. Chief Justice Waite, in his decision, stated:

> "It has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold."

Again the Chief Justice says:

> "It is insisted however that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question. As has already been shown, the practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable. We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by

legislatures the people must resort to the polls, not to the courts."

That Chief Justice Waite did not consider this power was without any limitation whatever is clearly evidenced by a later decision of the Supreme Court, written by him in the case of *Stone v. Farmers' Loan and Trust Co.*, the leading case in the series known as the *Railroad Commission cases*, (116 U. S. 307). Here we find the following:

> "From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

In this case the State statute was sustained. The reasonableness of rates themselves fixed by any commission or legislative tribunal was not considered.

Munn v. Illinois was made the principal one of several cases then pending before the Supreme Court. These cases, commonly called the *Granger cases*, have had a remarkable history. They have, perhaps, been cited as much, if not more, than any other set of cases ever rendered by any tribunal in the United States. They have been constantly used as precedents ever since they were rendered.

As late as April 29, 1907, Justice White, in *Atlantic Coast Line R. Co. v. North Carolina Corporation Commission*, 206 U. S. 1, cites the Granger cases as authorities, including in his reference:

> "*Chicago, B. & Q. R. Co. v. Ia.* (*v. Cutts*), 94 U. S. 155; *Peik v. Chicago & N. W. R. Co.*, 94 U. S. 164; *Chicago, M. & St. Paul R. Co. v. Ackley* 94 U. S. 179; *Winona & St. Paul R. Co. v. Blake*, 94 U. S. 180; *Stone v. Wisconsin*, 94 U. S. 181."

Following are some of the decisions of our courts using *Munn v. Illinois* as a precedent:

(1877) *Chicago, B. & Q. v. Cutts*, 94 U. S. 155; (1877) *Peik v. Chicago, etc. Ry. Co.*, 94 U. S. 164; *Winona Ry v. Blake*, 94 U. S. 180; (1877) *Stone v. Wisconsin*, 94 U. S. 181; (1877) *Twp. of Burlington v. Beasely*, 94 U. S. 310; (1878) *Sinking Fund Case*, 99 U. S. 700; (1878) *Hall v. De Cuir*, 95 U. S. 485; (1878) *Johnson v. Ry. Co.*, 16 Fla. 623, 26, Am. Rep. 731; (1878) *State v. Columbus Gas Light & Coke Co.*, 34 Ohio St. 572, 32 Am. R. 390; (1880) *Davis v. State*, (44 Am. R. 128) 68 Ala. 58; (1882) *Carton & Co. v. Ill. Cent. R. Co.*, 59 Ia. 148, (44 Am. Rep. 672); (1882) *Baker v. State*, 54 Wis. 368; (1883) *Civil Rights Cases*, 109 U. S. 3; (1883) *Western Union Tel. Co. v. Pendleton*, 95 Ind. 12, (48 Am. Rep. 692); (1883) *Ruggles v. People of Illinois*, 108 U. S. 526; (1883) *Antoni v. Greenhow*, 107 U. S. 769; (1884) *Spring Valley Water Works v. Schottler*, 110 U. S. 347; (1884) *Hurtado v. People of California*, 110 U. S. 516; (1885) *State v. Nebraska Tel. Co.* (22 N. W. 237), 17 Neb. 126; *Stone v. Railroad Co.*, 62 Miss. 607; (1886) *R. R. Commission cases*, 116 U. S. 307; (1886) *Wabash, etc., R. Co. v. Ill.*, 118 U. S. 557; (1886) *Morgan, etc., v. Board of Health of Louisiana*, 118 U. S. 455; (1886) *Johnson v. Chicago, etc.*, 119 U. S. 388; (1886) *Philadelphia, etc., v. Pa.*, 122 U. S. 326; (1886) *Hockett v. State*, 105 Ind. 250; (1887) *Mugler v. State of Kansas*, 123 U. S. 623; (1887) *Chesapeake & P. Tel. Co. v. Baltimore*, 66 Md. 399; (1888) *Dow v. Beidelman*, 125 U. S. 680; (1888) *Georgia Banking Co. v. Smith*, 128 U. S. 174; (1888) *Kidd v. Pearson*, 128 U. S. 1; (1888) *People v. King*, 110 N. Y. 418; 18 N. E. 245; (1888) *Railroad Co. v. R.*, 111 N. Y. 132, 19 N. E. 63; (1888) *Chicago & N. W. v. Dey*, 35 Fed. 866; (1889) *Telephone Co. v. State*, 118 Ind. 194; (1889) *Delaware, etc., Co. v. Central Stock Yard Co.*, 45 N. J. Eq. 50; (1889) *Zanesville v. Gas Light Co.*, 47 Ohio St., 1; 23 N. E. Rep. 55; (1892) *Budd v. N. Y.*, 143 U. S. 517; (1894) *Covington, etc., Bridge Co. v. Kentucky*, 154 U. S. 204; (1894) *Brass v. Stoesser*, 153 U. S. 391; (1896) *Mo. Pac. Ry. v. Neb.*, 164 U. S. 403; (1896) *Louisville & N. R. Co. v. Commonwealth of Kentucky*, 161 U. S. 677; (1897) *Interstate Commerce Commission v. C. N. O. & T. P. Ry. Co.*, 167 U. S. 479; (1899) *Lake Shore R. v. Smith*, 173 U. S. 684; (1901) *Minneapolis & St. Louis R. v. Minn.*, 186 U. S.

257; (1901) *Cotting v. Godard,* 183 U. S. 79; (1901) *Louisville & N. R. Co. v. Kentucky,* 183 U. S. 503; (1904) *Dobbins v. Los Angeles,* 195 U. S. 223; (1905) *Louisville & N. R. Co. v. West Coast Naval Stores Co.,* 198 U. S. 483; (1909) *McLean v. Arkansas,* 211 U. S. 539, 547; *Weems Steamboat Co. v. People's Co.,* (1909), 214 U. S. 345; (1907) (*Atlantic Coast Line v. N. Car. Corp. Com.,* 206 U. S. 1, does not cite *Munn v. Ill.,* but does cite all the Granger cases dealing with railroads and refers to them as controlling precedents).

These cases cite that decision on different grounds; but the majority refer specifically to the control of charges for public utilities fixed by the legislature, or by a legislative tribunal. This long array of cases merely shows how firmly this decision has become established as a precedent.

From time to time criticisms have been made upon the doctrine of *Munn v. Illinois,* but an impartial review of the cases must convince a fair-minded person that this noted decision has successfully withstood these attacks up to the present time. Perhaps the most bitter onslaught ever made upon that doctrine was delivered at the time of its rendition in a dissenting opinion by Justice Field; among his statements is the following:

> "So long as that decision remains, it will be a waste of words to discuss the questions argued by counsel in these cases. That decision, in its wide sweep, practically destroys all the guaranties of the constitution and of the common law invoked by counsel for the protection of the rights of the railroad companies."

Only one other member of the Supreme Court concurred in this dissent.

The whole question we are considering resolves itself down to this proposition: Has this Court substantially abandoned the doctrine of *Munn v. Illinois*?

In 1890 the famous case of the *Chicago, M. & St. P. R. Co. v. The State of Minnesota* (134 U. S. 418) was decided. By some this case was interpreted as a repudiation of the doctrine in *Munn v. Illinois,* and frequent use has been made of the statement to that effect by Justice Bradley in his dissenting opinion, in which he stated:

> "I cannot agree to the decision of the Court in this case. It practically overrules *Munn v. Illinois*, 94 U. S. 113, and the several railroad cases that were decided at the same time. The governing principle of those cases was that the regulation and settlement of the fares of railroads and other public accommodations is a legislative prerogative, and not a judicial one. This is a principle which I regard as of great importance."

However, the conception of the effect of this decision that it overruled *Munn v. Illinois* is not warranted by the decision itself, nor is it sustained by future adjudications of the Supreme Court.

Mr. Justice Blatchford, who rendered the opinion in 1890, just referred to, in *Chicago, M. & St. Paul R. Co. v. Minnesota*, also wrote the opinion later, in 1892, in the case of *Budd v. People of the State of New York* 143 U. S. 517, where he states the main issue as follows:

"The main question involved in these cases is whether this Court will adhere to its decision in *Munn v. Illinois*, 94 U. S. 113." That this was the main issue is also recognized by Justice Brewer in his dissenting opinion (concurred in by Justices Field and Brown) where he states:

> "I dissent from the opinion and judgment in these cases. The main proposition upon which they rest is, in my judgment, radically unsound. It is the doctrine of *Munn v. Illinois*, 94 U. S. 113, reaffirmed."

Mr. Justice Blatchford in his opinion for the Court in *Budd v. New York* (1892), refused to accept the dictum of Justice Bradley that the doctrine of *Munn v. Illinois* had been overruled. Justice Blatchford states that "the opinion of the Court did not say so, nor did it refer to *Munn v. Illinois*."

At this time the second serious attack of note was made upon *Munn v. Illinois*. It was in the form of a dissenting opinion by Mr. Justice Brewer. The prevailing opinion in the New York Court was affirmed by the majority in the Supreme Court of the United States. In the New York Court a strong dissenting opinion was filed by Judge Peckham and Judge Gray, the basis for which was the dissenting opinion written

by Judge Peckham in the case of *People v. Walsh.* Judge Peckham was later elevated to the Supreme Bench. Mr. Justice Peckham based his dissent largely on Mr. Justice Field's dissent to the decision in *Munn v. Illinois.*

> "All the instances above cited are commented on in the very able dissenting opinion of Mr. Chief Justice Field in the Munn case. Many instances of the benefits of this provision (the 14th Amendment) are cited in those cases, and in the dissenting opinion of Mr. Justice Field in the Munn case, which it seems to me is a most masterly examination and clear statement of the principles which I believe this State has always stood by and protected through its courts." *People v. Walsh.*, (Not reported. Justice Peckham's dissenting opinion was printed at the end of *People v. Budd,* 117 N. Y. 1, at p. 34).

In *Budd v. New York,* 143 U. S. 517, 538, 543, Justice Blatchford gives, in 1892, an extended review of many cases, giving the following as the opinion of the Court:

> "It is thus apparent that this court has adhered to the decision in *Munn v. Illinois,* and to the doctrines announced in the opinion of the Court in that case; and those doctrines have since repeatedly been enforced in the decisions of the courts of the States." His conclusion is: "We must regard the principle maintained in *Munn v. Illinois* as firmly established."

The third noted attack upon *Munn v. Illinois* also failed. In 1894 the Supreme Court was again divided upon this proposition in the case of *Brass v. North Dakota* (153 U. S. 391). Justice Brewer insisted upon a distinction not pertinent to our present inquiry. His argument at that time was an attempt to distinguish between the doctrines controlling parties "who have devoted their property to a use in which the public has an interest, although not engaged in a work of a confessedly public character," as warehousemen, and "parties engaged in performing a public service," as those operating railroad, gas and water companies, having franchise or corporate rights granted them by the government. Mr. Justice Brewer claimed public control should be much less in the former than in the latter class of cases. He urged

this very strongly in *Brass v. North Dakota.* This ground was also taken by him in *Budd v. People of New York, supra.* In these cases Justice Brewer claimed that the state should exercise no more control over this class of enterprises than over private parties. In his dissent from the recognition of the doctrine of *Munn v. Illinois* his opinion was concurred in by several justices, but not by the majority. In the later case of *Cotting v. Godard* (183 U. S., 79), Justice Brewer again insists upon a modification of the principle in *Munn v. Illinois.* This part of the decision, while it was not dissented from, yet it was not concurred in by Justices Harlan, Gray, Brown, Shiras, White or McKenna, these members of the Court basing their concurring opinion upon another portion of the decision.

Since 1901 there has been no direct attack upon the doctrine of *Munn v. Illinois* in the decisions of the Supreme Court. That case seems to have been finally accepted as law.

During the past few years, however, there seems to have been concerted effort on the part of several district and circuit court judges, as well as writers of text books, to overthrow the basic principle of *Munn v. Illinois.* This attempt has reached such magnitude that it would seem the fate of that doctrine is again at stake. Judge Sanborn's decision is probably the most remarkable and aggressive effort of this character ever attempted.

Some try to show a change in the attitude of the Supreme Court, as taking place in the decision of *Smyth v. Ames,* in 1898, (169 U. S. 466.) A careful reading of that decision, however, will show that it makes no attempt to overthrow or alter the former decisions of the Supreme Court. A comparison of that decision with the one in *Stone v. Farmers Loan & Trust Co.,* rendered in 1886 by the same Chief Justice who wrote the opinion in the *Granger cases,* will show no substantial difference.

In *Smyth v. Ames,* the rates were confiscatory, as that expression was defined by Justice Brewer in *Chicago & N. W. v. Dey, etc.,* 35 Fed. Rep. 866. The passages, so often quoted, which express the theme of *Smyth v. Ames,* are as follows:

> "A state enactment, or regulations made under the authority of a state enactment, establishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation as, under all circumstances, is just to it and to the public, would deprive such carrier of its property without due process of law, and deny to it the equal protection of the law, and would, therefore, be repugnant to the Fourteenth Amendment of the Constitution of the United States.
>
> "While rates for the transportation of persons and property within the limits of a state are primarily for its determination, the question of whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and therefore, without due process of law, cannot be so conclusively determined by the legislature of the state, or by the regulations adopted under its authority, that the matter may not become the subject of judicial inquiry."

The expression "just compensation" and "reasonable compensation" are easily interchangeable. The clause "such compensation as, under all the circumstances is just," can be interpreted in two ways; it either means that some compensation is necessary which will yield some profits above expenses, or justice will not be rendered; or it refers to that particular amount of compensation which is just in each case, thus making the amount of compensation subject to federal control through the judiciary.

The language of the passages just quoted does not go any farther, nor does it alter or modify the following which was written by Chief Justice Waite in his opinion rendered in 1886 in the case of *Stone v. Farmer's Loan and Trust Co., supra*:

> "Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

We thus find that the doctrines of *Smyth v. Ames* in 1898 and *Stone v. Farmer's Loan and Trust Co.*, in 1886, are sub-

stantially the same. There is no material change in the doctrines of the Supreme Court and no attempt on the part of Justice Harlan in 1898 to alter or modify the principles formerly announced by that tribunal. If there was a change in the policy of the Supreme Court on these questions, that change must be carried back to 1886.

Some have adopted the interpretation of those passages, quoted above, which would mean that the whole question of how much profit constitutes a "just compensation" is for the final determination of the courts. Many isolated passages are quoted in support of this doctrine and many others can be cited to the contrary effect. By themselves such statements seem quite confusing. Much of this apparent confusion arises from the ambiguity of words.

The cases are quite uniform in holding that the courts can declare certain rates to be unjust and unreasonable. Is the review of legislative action by the judiciary without limit? If that is true then the courts have practically supplanted our legislatures in this regard and *Munn v. Illinois* is over ruled. Chief Justice Waite wrote the opinions in both cases of *Stone v. Farmer's Loan and Trust Co.*, and *Munn v. Illinois*. Can it be that he intended to repudiate the latter? He very plainly states in the former case that the legislature cannot take private property for public use without just compensation. In so stating this principle he merely repeats portions of the Fifth and Fourteenth Amendments to the Constitution. At the same time in the following passage it will be seen that he fully recognizes the doctrine established by the *Granger Cases*.

> "In *Munn v. Illinois*, 94 U. S., 134 and *C. B. & Q. v. Iowa*, id. 155, this Court decided that, as to natural persons and corporations subject to legislative control, the state could, in cases like this, fix a maximum beyond which any charge would be unreasonable; that such maximums, when fixed, would be binding on the courts in their adjudications, as well as on the parties in their dealings." (*Stone v. Farmers Loan & Trust Co.*, 116 U. S. 307—*Railroad Commission Cases.*)

How far can the courts go in declaring a rate fixed by a legislature to be unreasonable and unjust? Is there any limit to the possible interference by the judiciary? The legislature, so the courts say, has sole jurisdiction over fixing maximum rates, and its decisions "bind the courts as well as the people." And yet these same courts declare that *they* can set aside such rates as unjust and unreasonable.

Justice Brewer reconciles these conflicting principles in *Chicago & N. W. R. R. Co. v. Dey, et al,* 35 Fed. 866. This case has frequently been cited as a precedent in the decisions of the district and circuit courts, and recently it has been referred to as a precedent in decisions of the Supreme Court. The specific rule laid down in this case, in 1888, by Justice Brewer has never been quoted in any decision of the Supreme Court that we have found, and yet no decision has ever been rendered by this Court which goes contrary to the rule Justice Brewer stated at that time. A doctrine that reconciles the principles of the *Granger Cases* of 1877, and the *Railroad Commission Cases* of 1886, and a doctrine which clearly defines the limits of judicial interference with legislative activity in such a manner that no exception to it can be found in the many decisions of the Supreme Court of the United States on this perplexing problem during the past thirty-four years, is certainly worthy of our most careful consideration.

In the case of *Chicago & N. W. R. Co. v. Dey et al,* Brewer (then Circuit Judge) rendered the decision in the Circuit Court of the United States for the Southern District of Iowa. The case arose over rates fixed by the Iowa Railroad Commission. Mr. Brewer quoted from the *Granger and Railroad Commission Cases,* plainly recognizing the limitations upon legislative action; and he made the following comment relative thereto:

> "That it was not intended to decide that the legislature had power to fix any rates, reasonable or unreasonable, is obvious from the subsequent language of the same Chief Justice in the later case of *Stone v. Farmers Loan and Trust Co.*"

He then makes the quotation from that case given above and cites *Dow v. Beidelman*, 125 U. S. 689. Justice Brewer further states:

> "Of course some rule must exist, fixed and definite, to control the action of the courts, for it cannot be that a chancellor is at liberty to substitute his discretion as to the reasonableness of rates for that of the legislature. The legislature has the discretion, and the general rule is that where any officer or board has discretion its acts within the limits of that discretion are not subject to review by the courts.
>
> "Counsel for complainants urge that the lowest rates the legislature may establish must be such as will secure to the owners of the railroad property a profit on their investment at least equal to the lowest current rate of interest, say 3 per cent. Decisions of the Supreme Court seem to forbid such a limit to the power of the legislature in respect to that which they apparently recognize as a right of the owners of the railroad property to some reward; and the right of judicial interference exists only when the schedule of rates established will fail to secure to the owners of the property some compensation or income from their investment. As to the amount of such compensation, if some compensation or reward is in fact secured, the legislature is the sole judge.
>
> "The question is then one alone of policy. Whether, by reducing the compensation to a minimum, railroad enterprises shall be discouraged, or, enlarging, encouraged, is a matter for legislative, and not judicial, determination. Take a kindred matter; it is within the power of the legislature to prescribe the rate of interest and to punish by severe penalties the exaction of larger than the legal rate. What that legal rate shall be is not for the courts, but the legislature to determine,—the rule, therefore, to be laid down, is this: that where the proposed rates will give some compensation, however small, to the owners of railroad property, the courts have no power to interfere. Appeal must then be made to the legislature and the people. But where the rates prescribed will not pay some compensation to the owners, then it is the duty of the courts to interfere and protect the companies from such rates."

The rule, as above stated, adopted by Justice Brewer July 27, 1888, after the decisions had been rendered in *Stone v. Farmer's Loan and Trust Co., supra,* and in *Dow v. Beidelman,* 125 U. S. 689, and eleven years after the *Granger Cases,* that principle was never changed in any of Justice Brewer's decisions since that date; and in no opinion written by any other member of the Supreme Court has any decision ever been rendered which would be contrary to that doctrine.

As thus stated it was but an amplification of the doctrines announced by Chief Justice Waite in the *Granger Cases* of 1877, and further outlined by the same Chief Justice in the *Railroad Commission Cases* of 1886.

On July 27, 1888, a temporary injunction had been issued in *Chicago & N. W. R. Co. v. Dey etc., supra.* On the second of February, 1889, another case involving the same parties, but concerning different rates, came up for hearing on a preliminary injunction. A restraining order, which had been entered November 27, 1888, was set aside, and the preliminary injunction was refused at that time. In his decision of this case Justice Brewer reaffirmed the doctrine announced in his former ruling. He does this in very plain terms:

> "This brings us to the last of the three questions suggested, to-wit: the reasonableness of the rates. In respect to this I have nothing to add to what I said in the opinion heretofore filed concerning the rules controlling judicial action. I abide by the propositions then laid down, and have simply sought to apply these rules to the facts developed by the testimony now presented."

After discussing the actual deficit of the road represented by Mr. Ripley for the year 1888, Justice Brewer states that this is not a typical year:

> "Turning back to the year 1887, it appears from the same testimony that the operating expenses and fixed charges were $21,381,997.60 and that the gross earnings submitted to the Commissioners' last schedule would have amounted to $21,656,583.04, leaving a balance of net earnings of $272,585.44, which would make a dividend of 35-100 of one per cent, of the capital stock. Mr. Ripley says this was a prosperous year for the complainant. While

that may be true, yet while looking back on the reports for prior years, it does not appear to have been an exceptionally prosperous year. While the tonnage of freight carried exceeded that largely in prior years, yet the gross freight earnings were less than that of three of the prior years. Indeed, looking back through the reports as far as 1870, it would seem that the company received less per ton for carrying freight during 1887 than in any prior year. If that be true, and the reduction made by the last schedule of the defendant applied generally to all the freight business of the company would still leave a balance although a small one, for distribution among the stock holders, how, within the rules laid down in the prior opinion, can I hold that the rates are so unreasonable as to justify judicial interference?"

A different decision of *Chicago, M. & St. Paul R. Co. v. Minn.*, 134 U. S. 418, in 1890, would have meant the extension of legislative discretion far beyond the doctrine of the *Granger* and *Railroad Commission cases* as interpreted by Justice Brewer in the *Dey case*. If Justice Bradley's theory in the Minnesota case had prevailed in the minds of the majority of the court, and that had been followed as the law, it would have meant that an act of the legislature would be final even though no compensation whatever was left above expenses, and the rates proved confiscatory. Such a legislative act might clearly violate the Fifth and Fourteenth Amendments of the Constitution, and yet the Courts would be helpless to protect property interests because the act of the legislature was conclusive. The courts have followed the course rather of recognizing the legislative acts as conclusive up to the limit when such rates prove confiscatory, thereby violating constitutional rights, then the courts will interfere. The position taken by Justice Bradley, up to that extent, represents what has been accepted as law. In the following language Justice Bradley has set forth what is, with the foregoing qualification, the sound policy of the law:

"There must be a final tribunal somewhere for deciding every question in the world. Injustice may take place in all tribunals. All human institutions are imperfect—courts as well as commissions and legislatures. What-

ever tribunal has jurisdiction, its decisions are final and conclusive, unless an appeal is given therefrom. The important question always is, what is the lawful tribunal for the particular case? In my judgment, in the present case, the proper tribunal was the legislature, or the board of commissioners which it created for the purpose."

Justice McKenna, before being appointed a member of the Supreme Court, claimed, in *Southern Pacific Co. v. Board of R. R. Commissioners of Calif.* (78 Fed. 236) that Justice Brewer abandoned the foregoing doctrine in *Ames v. Union Pac.* (64 Fed. 165). An examination of the facts found by Justice Brewer in the last named case will not justify such a conclusion. Notice the language of the decision itself:

"It is difficult to resist the conviction that if the rates prescribed by House Roll 33 had been in force during the year ending June 30, 1892, not a single one of these roads would have earned a dollar from the transportation of local freight. It is true that exhibit 4 shows the effect of the reduction caused by House Roll 33, only for the business of a single year—that ending June 30, 1892; but a comparison of the business of 1891 and 1893 with that for 1892, as found in Exhibit 20, shows an average per cent of expenses less in 1892 than in either of the other years. So that evidently the year 1892 was selected by the board of transportation for the making of its exhibit 4, as the most favorable."

In the Supreme Court, Justice Harlan wrote the opinion affirming the decision of the Circuit Court. In this decision Justice Harlan modified somewhat the finding of facts made by Justice Brewer. Justice Harlan found that in the three years, 1891, 1892 and 1893, one of the seven roads involved, the Union Pacific, would have had a small amount of receipts above operating expenses in 1892 and in 1893 and that the Fremont Company would have had the same in 1891 and 1893; while those roads for the remaining years, and all the other roads for all three years would not have had sufficient receipts to meet their operating expenses, and they would have had nothing to apply on their fixed charges, including bonded indebtedness. Consequently both these decisions clearly come

under the doctrine announced by Justice Brewer in *Chicago & N. W. v. Dey, etc., supra.*

It must be conceded that there should be some limit upon judicial interference with legislative action or else the result will be that the judiciary will supplant the legislature.

In no case up to the present time has the Supreme Court of the United States ever set aside any rates fixed by a legislative tribunal, which the court found would yield, under ordinary circumstances, some compensation above legitimate expenses. A brief sketch of the facts in some of the leading cases will be made.

In *Stone v. Farmer's Loan and Trust Co.*, quoted above, the state statute was sustained. No rates were in issue. In the *dictum* quoted it is very evident that the court referred to confiscatory rates. This will be seen by reading the immediately preceding clause in the same paragraph:

> "From what has been said it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation."

In *Smyth v. Ames* (1898) the rates in issue were confiscatory.

In *Railway Co. v. Wellman* (1892), 143 U. S., 339, it was held that "the legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates." This *dictum* goes no farther than the doctrines laid down in *Chicago & N. W. R. Co. v. Dey, etc.*, and the other cases referred to in the text. In this case the Supreme Court refused to interfere, Justice Brewer holding as follows:

> "The theory upon which, apparently, this suit was brought, is that parties have an appeal from the legislatures to the courts, and that the latter are given an immediate and general supervision of the constitutionality of the acts of the former. Such is not true."

Justice Brewer adds that in real contests where the competency of the legislature to act is in question the courts must determine its constitutionality, continuing:

"But such an exercise of power is the ultimate and supreme function of the courts. It is legitimate only in the last resort, and as a necessity in the determination of the real, earnest and vital controversy between individuals. It was never thought that by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act." In view of these words of the distinguished jurist in 1892 the proposition is certainly astounding that you can exercise this extraordinary function by transferring from the legislature to the courts an inquiry as to the *wisdom* and *policy* of legislative acts.

In *Reagan v. Farmers Loan & Trust Co.* (1894), 154 U. S. 362, Justice Brewer in the opinion of the Court states:

> "There can be no doubt of their (the courts) power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and if found so to be, to restrain its operation."

In this statement the Justice does not vary from the doctrine of *Chicago N. W. v. Dey, etc., supra,* nor is the application different. Some of the important facts found are as follows:

> "The road cost far more than the amount of the stocks and bonds outstanding; that such stocks and bonds represent money invested in its construction; that under the rates voluntarily established, the stock which represents two-fifths of the value, has never received anything in the way of dividends, and that for the last three years the earnings above operating expenses have been insufficient to pay the bonded debt."

In *Covington & L. Turnpike Co. v. Sandford,* 164 U. S. 596, the issue was raised on demurrer as to the sufficiency of defendant's answer, and the demurrer was overruled, the answer being held sufficient. The answer alleged that the proposed reduction would amount to 50 per cent, and that "such reduction would so diminish the income of the company that

it could not maintain its road, meet its ordinary expenses, and earn any dividends whatever for stockholders."

The Court holds this allegation would present an adequate statement of a valid defense. But the Court adds:

> "It is proper to say that if the answer had not alleged, in substance, that the tolls prescribed by the act of 1890 were wholly inadequate for keeping the road in proper repair and for earning dividends, we could not say that the act was unconstitutional merely because the company (as was alleged and as the demurrer admitted) could not earn more than four per cent on its capital stock."

In *Pingree v. Mich. Cen. R. R. Co.*, 118 Mich. 314; the case turned upon a contract estopping the state. In *Pensacola & A. R. Co. v. State*, 25 Fla. 310, the rates were found to be confiscatory. In *Chicago, St. Paul, M. & O. R. Co. v. Becker*, 35 Fed. 883, the rates were found to be confiscatory. In *Lake Shore & Michigan So. Co. v. Smith*, 173 U. S. 684, the law in issue applied to mileage books and was held unconstitutional without reference to the amount of compensation. In *Chicago, M. & St. Paul Ry. Co. v. Minnesota* (1890), 134 U. S. 418, there was no opportunity to test the rates in court. They might be confiscatory, and therefore legally unjust and unreasonable, without any opportunity for the Court to ascertain that fact. This case is further discussed elsewhere in this brief. The case of *Minneapolis E. R. Co. v. Minnesota* (1890), 134 U. S. 467, follows *Chicago, M. & St. Paul Ry. Co. v. Minnesota* as a precedent, the facts being even stronger than in that case, the Company being denied a hearing even before the Commission.

During recent years a very large number of acts of legislatures, commissions and boards, fixing rates, have been examined judicially, and left undisturbed.

St. Louis & San Francisco R. Co. v. Gill, 11 L. R. A. 452 (Ark.); 156 U. S. 649; *Brass v. North Dakota, Stoeser*, 153 U. S. 391, affirming state, *Stoeser v. Brass*, 2 North Dakota, 482; 52 N. W. 408. In re Annon, 50 Hun. 415, affirmed, People, *Annon v. Walsh;* 26 New York, S. R. 554. *C. B. & Q. v. Cutts*, 94 U. S. 155. *Winona & St. Paul R. Co.*

v. Blake, 94 U. S. 180. *Dow v. Beidelman*, 125 U. S. 680, affirming 49 Arkansas, 325. *Peik v. C. & N. W.*, 94 U. S. 164. *Missouri Pacific R. Co. v. Smith*, 60 Arkansas, 221, 5 Int. Com. Rep. 348. *Buffalo East Side R. Co. v. Buffalo St. R. Co.*, 111 N. Y. 132, 2 L. R. A. 384. *Parker v. Metropolitan R. Co.*, 109 Mass., 506. *State v. Edwards*, 86 Me., 102, 25 L. R. A. 504. *West v. Rawson*, 40 W. Va., 480. *C. & G. T. R. Co. v. Wellman*, 143 U. S., 339. *American Coal Co. v. Consolidated Co.*, 46 Md. 15. *Tilley v. Savannah, F. and W. R. C.*, 4 Woods, 449, 5 Fed. Rep. 641. *C. M. & St. P. R. v. Ackley*, 94 U. S. 179. *Winchester & L. Turnpike Road Co. v. Croxton*, 98 Ky. 739, 34 S. W. 518, 33 L. R. A. 177. *Chicago Union Traction Co. v. Chicago*, 199 Illinois 484; 65 N. E. 451; 59 L. R. A. 631. *Purdy v. Erie R. Co.*, 162 N. Y. 42; 56 N. E. 508; 48 L. R. A. 669. *Winona, etc., v. Blake, et al.*, 94 U. S. 180. *Stone v. Wisconsin*, 94 U. S. 181. *Stanislaus v. San Joaquin, etc.*, 192 U. S. 201. *Minneapolis & St. Louis R. v. Minnesota*, 186 U. S. 257. *San Diego Water Co. v. San Diego*, 118 Cal. 556; 62 Am. St. Rep. 261 (lower court holds city ordinance void. State Sup. Ct. reverses and orders a new trial). *San Diego Land Co. v. National City*, 174 U. S. 739. *San Diego Land and Town Co. v. Jasper*, 189 U. S. 439.

In the early case of *Spring Valley Water Works v. Schottler, et al*, (1884), 110 U. S. 347, there were no rates in issue, but since so much of the law on this subject is mere *dicta*, it may be worth while to note the statement of the court in this case:

> "Long before the constitution of 1879 was adopted in California, statutes had been passed in many of the states requiring water companies, gas companies and other companies of like character, to supply their customers at prices to be fixed by the municipal authorities of the locality; and as an independent proposition, we see no reason why such a regulation is not within the scope of legislative power, unless prohibited by constitutional limitations or valid contract obligations. Whether expedient or not is a question for the legislature, not the courts."

In *Brass v. North Dakota* (1894), 153 U. S. 391, the Supreme Court sustained rates of charges for elevators fixed by the state legislature. In a later case Justice Brewer, commenting on this one held, that the reasonableness of the rates themselves was not in issue, but rather the power to fix the rates.

In *Brass v. North Dakota, supra,* the following excerpt is pertinent to the discussion in hand:

> "It may be conceded that that would not be wise legislation which provided the same regulations in every case, and overlooked the differences in the facts that called for regulations. But as we have no right to revise the wisdom or expediency of the law in question, so we would not be justified in imputing an improper exercise of discretion to the legislature of North Dakota. It may be true that, in the cases cited, the judges who expressed the conclusions of the court entered, at some length into a defense of the propriety of the laws which they were considering, and that some of the reasons given for sustaining them went rather to their expediency than to their validity. Such efforts, on the part of the judges, to vindicate to citizens the ways of legislatures are not without value, though they are liable to be met by the assertion of opposite views as to the practical wisdom of the law, and thus the real question at issue, namely, the power of the legislature to act at all, is obscured."

The doctrine of *Munn v. Illinois* has been imbedded in our system of law by thirty-four years of experience.

The principle announced by Chief Justice Waite in 1877, has stood several severe strains during the past generation. Notwithstanding the many direful prophecies of calamity made thirty years ago, the railroads of this country have not perished off the face of the earth. On the contrary, they have made fabulous progress, unparalleled in any other country upon the globe.

Mr. Justice Brewer never questioned the application of the doctrine of *Munn v. Illinois* to railroads and other public service corporations, having recognized the jurisdiction of the legislature as absolute except when the rates become confiscatory. His dissenting opinion in *Brass v. North Dakota, supra,* and *Budd v. New York, supra,* were based upon his contention that such regulation should be confined to corporations which were more of a public character than warehouses or elevators.

Mr. Justice McKenna, before being appointed to the Supreme Court, indicated a position opposed to the full recogni-

tion which has been accorded by other judges to the doctrine of *Munn v. Illinois*. *Southern Pacific Co. v. Board of R. R. Com. of Calif.*, 78 Fed. 236.

Mr. Justice Peckham objected to such legislative discretion. Apparently he would have had the courts pass upon all the items involved in a consideration of the reasonableness of rates. It would appear from *dicta* in decisions written by him, that he would have made the courts constitute a sort of appellate branch of the legislature. In *Stanislaus Co. v. San Joaquin, etc., Co.* (1904), Justice Peckham (who would have repudiated *Munn v. Illinois* in the case of *Budd v. New York*), says:

> "In *San Diego Land and Town Co. v. National City*, 174 U. S. 739, it was held (following *Smyth v. Ames*, 169 U. S. 466, 543, 544), that what the company was entitled to demand in order that it might have just compensation was a fair return upon the reasonable value of the property at the time it was being used for the public. The appellants in that case contended that in fixing what were just rates the court should take into consideration the cost of the plant and of its annual operation, the depreciation of the plant, and a fair profit to the company above its charges for services. It was observed by the Court that undoubtedly all these matters ought to be taken into consideration and such weight be given them, when rates are being fixed, as, under all the circumstances, would be just to the company and to the public. The same principle is reaffirmed in *San Diego Land and Town Co. v. Jasper*, 189 U. S. 439, 442;" *Stanislaus Co. v. San Joaquin, etc.*, 192 U. S. 201.

So far as this case is concerned as a precedent, it is necessary to note that the rates fixed by the legislature were sustained by the Supreme Court and that the decision of the Circuit Court, nullifying the legislative rates, was reversed by the Supreme Court. The foregoing language, used by Justice Peckham, would indicate, however, that all such matters are for the determination of the courts finally. This interpretation of that case may not be the one intended by the author of the opinion, but such is the conception of the decision which is seen very often in the text books and digests. We will ex-

amine the two cases referred to by Mr. Justice Peckham, and see if this view of the law is fully endorsed by the other members of this Court at that time.

One of the opinions referred to was written by the late Justice Harlan, who frequently discussed at length the extent of judicial interference with the legislature. In the decision cited entitled *San Diego Land and Town Co. v. National City* (1899), Justice Harlan said:

> "The only issue properly to be determined by a final decree in this case is whether the ordinance in question fixing rates for water supplied for use within the city is to be stricken down as confiscatory by its necessary operation, and therefore, in violation of the constitution of the United States. If the ordinance, considered in itself, and as applicable to water used within the city, is not open to any such objection, that disposes of the case, so far as any rights of the appellant may be affected by the action of the defendant." *San Diego Land and Town Co. v. National City*, 174 U. S. 739.

In this case, while discussing the effect of *Chicago, M. & St. P. R. Co. v. Minnesota, supra*, Mr. Justice Harlan says:

> "What the Court has said about the Minnesota statute can have no application to the present case, unless it is made to appear that the Constitution and laws of California invest the municipal authorities of that State with power to fix water rates arbitrarily, without investigation, and without permitting the corporations or persons affected thereby to make any showing as to rates to be exacted or to be heard at any time or in any way upon the subject."

Justice Harlan quotes in his opinion, with approval, the following portion of the decision in *Spring Valley Water Works v. City of San Francisco*, 82 California, 286; 22 Pac. 910:

> "When the Constitution provides for the fixing of rates or compensation, it means reasonable rates and just compensation. To fix such rates and compensation is the duty and within the jurisdiction of the board. To fix rates not reasonable or compensation not just, is a plain violation of its duty. But the courts cannot, after the board has

fully and fairly investigated and acted, by fixing what it believes to be reasonable rates, step in and say its action shall be set aside and nullified, because the courts, upon a similar investigation, have come to a different conclusion as to the reasonableness of the rates fixed. There must be actual fraud in fixing the rates, or they must be so palpably and grossly unreasonable and unjust as to amount to the same thing."

At the conclusion of the *National City* case, Justice Harlan said:

> "It is sufficient to say that upon a careful scrutiny of the testimony our conclusion is that no case is made that will authorize a decree declaring that the rates fixed by defendant's ordinance looking at them in their entirety—and we cannot properly look at them in any other light—are such as amount to a taking of property without just compensation, and therefore, to a deprivation of property without due process of law. There is evidence both ways. But we do not think that we are warranted in holding that the rules upon which the defendant's board proceeded were in disregard of the principles heretofore announced by this court in the cases cited. The case is not one for judicial interference with the action of the local authorities, to whom the question of rates was committed by the state."

It would seem, therefore, that if the legislative tribunal follows correct methods of investigation, and does in fact give the parties involved a hearing, that its decision is practically conclusive upon the courts.

Mr. Justice Holmes has written several opinions upon this branch of the law since taking a seat in the Supreme Court. His attitude towards these questions is plainly shown in the opinion written by him in the case, referred to above in the quotation from Justice Peckham, entitled *San Diego Land & Town Co. v. Jasper* (1903). In this case Mr. Justice Holmes states:

> "We do not sit as a general appellate board of revision for all rates and taxes in the United States. We stop with considering whether it clearly appears that the Constitution of the United States has been infringed, together

with such collateral questions as may be incidental to our jurisdiction over that one." *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439.

And further Justice Holmes says:

"In a case like this we do not feel bound to re-examine and weigh all the evidence, although we have done so, or to proceed according to our independent opinion as to what were proper rates. It is enough if we cannot say that it was impossible for a fair-minded board to come to the result which was reached."

The court outlines, as was done in *San Diego Land & Town Co. v. Jasper, supra*, what matters should be taken into consideration by the legislative tribunals in determining the reasonableness of rates. If that is not done then the courts may interfere.

The attitude of Mr. Justice Holmes and his interpretation of the doctrines laid down in *San Diego Land & Town Co. v. National City* is further shown in his statements in *Chicago, B. & Q. R. Co. v. Babcock* (1907), 204 U. S. 585, where he relies upon the *National City case* as one of his main authorities. This case concerned an attempt to defeat certain assessments of taxes made by a state board of equalization in Nebraska. The action of the state board was upheld by the Supreme Court of the United States. In the opinion, written by Mr. Justice Holmes, we find the following:

"All the oft-repeated reasons for the rule as to jurymen apply with redoubled force to the attempt, by exhibiting on cross-examination the confusion of the members' minds, to attack in another proceeding the judgment of a lay tribunal which is intended, so far as may be, to be final, notwithstanding mistakes of fact or law. See *Coulter v. Louisville & N. R. Co.*, 196 U. S. 599, 610; *Central P. R. Co. v. California*, 162 U. S. 91, 107, 108, 117; 105 Cal. 576, 594; 38 Pac. 905; *State Railroad Tax Cases*, 92 U. S. 575; *Cleveland C. C. & St. L. R. Co. v. Backus*, 133 Ind. 513, 542."

Different alleged mistakes are discussed. The manner of disposing of these is shown by the following passage:

"It is said that this valuation is absurd and due to misunderstanding of the table. But we have nothing to do with complaints of that nature, or with anything less than fraud, or a clear adoption of a fundamentally wrong principle."

In conclusion Justice Holmes states:

"The board was created for the purpose of using its judgment and its knowledge. *State Railroad Tax Cases*, 92 U. S. 575; *State ex rel Bee Bldg. Co. v. Savage*, 65 Nebraska 714, 768, 769; *Re Cruger*, 84 N. Y. 619, 621; *San Jose Gas Co. v. January*, 57 Cal. 614, 616. Within its jurisdiction, except, as we have said, in the case of fraud or a clearly shown adoption of wrong principles, it is the ultimate guardian of certain rights. The state has confided those rights to its protection and has trusted to its honor and capacity as it confides the protection of other social relations to the courts of law. Somewhere there must be an end. We are of the opinion that, whatever grounds for uneasiness may be perceived, nothing has been proved so clearly and palpably as it should be proved, on the principle laid down in *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 754, in order to warrant these appeals to the extraordinary jurisdiction of the Circuit Court."

In this decision the opinion of Justice Holmes was concurred in by Chief Justice Fuller, and Justices Harlan, Brewer, Brown, White, Day and Moody.

The attitude of certain distinguished members of the Supreme Court at that time on this subject is again disclosed by the fact that the two members of this Court, who dissented from the decision just referred to, which was rendered in February, 1907, were Mr. Justice McKenna and Mr. Justice Peckham.

Again, in the case of *Willcox et al v. Consolidated Gas Co.*, 212 U. S. 19, Mr. Justice Peckham made a specific statement to the following effect: "We concur with the court below on this question, and think complainant is entitled to six per cent on the fair value of its property devoted to the public use." This finding was not necessary to the decision and is *dictum*. The same result can be reached without any holding that they

were entitled to that sum; a finding that six per cent is not confiscation is the only part of the conclusion of the court necessary to determine the issue of that case. The Court found the company was making substantially six per cent, and the rates were sustained. Had the rates made only four per cent, then the establishment of such a minimum would have been a necessary determining factor for the conclusion arrived at. Mr. Justice Moody at the same time made a much more guarded statement on precisely the same issue in the opinion written by him in the case of *City of Knoxville v. Knoxville Water Co.*, 212 U. S. 1, where he states: "The net income in any event would be substantially 6 per cent, or 4 per cent, after an allowance of 2 per cent, for depreciation. See *Stanislaus Co. v. San Joaquin Co.*, 192 U. S. 201. We cannot know clearly that the revenue would not much exceed that return. We do not feel called upon to determine whether a demonstrated reduction of income to that point would or would not amount to confiscation." Then the Justice dwells upon the uncertainty of the evidence, and the necessity for a test of the rates, refusing to enjoin the enforcement of the city ordinance fixing the rates in issue.

As to the present status of the law we must judge by the precedents, and we can gather some light from *dicta* in the cases. While we have found substantial harmony in the actual decisions, we find many *dicta* are contradictory. We are told that the question of the reasonableness of rates is a legislative question, and yet we are also told that the courts will set aside unreasonable rates. Much of this confusion is due to ambiguity of words. Unreasonable, unjust, and inadequate compensation are terms which have received technical definitions in the decisions. The proper interpretation of these words plays an important part in this discussion.

A rate which fails to yield some compensation above expenses has been held by the courts to be legally an unreasonable rate, and the revenue derived therefrom has been declared to be an unjust compensation, and the rate confiscatory. The rate itself may not confiscate the property immediately; and yet, as clearly stated by the courts, such rates would in-

evitably cause virtual confiscation; therefore the courts have declared such rates to be confiscatory. When there are some profits, the question whether or not they are adequate has heretofore been left to the legislative tribunal.

The standard of reasonableness we find is different for the commission and the court. The commission in determining the "reasonableness" of a rate has many matters to consider, while the questions for judicial determination are entirely separate and distinct therefrom. For instance, the courts ascertain if the law under which the legislative tribunal is acting provides for a hearing to be granted to the railway company, and whether the law attempts to bar judicial investigation; another question for judicial inquiry is whether any compensation is left above legitimate expenses; if not, then the rate is, legally speaking, unreasonable and unjust; a third matter for the courts to determine is whether the legislative tribunal has pursued proper methods of investigation and whether the fundamentally legal principles followed were right or wrong.

There are innumerable items which *may* be considered in fixing rates; among these there are some facts which the commission *must* make a proper effort to ascertain, in order to avoid judicial interference. When the adequateness of the compensation yielded by the proposed rates is placed in issue the following items must be considered: The interests of the public; the interests of the railroad company; and the fair value of the property being used for the convenience of the public at the time it is so used, this includes the original cost of the construction, the amount expended in permanent improvements, the amount and market value of the stocks and bonds, the present as compared to the original cost of construction, the probable earning capacity of the property under the particular rates prescribed by the statute, the sum required to meet the operating expenses and whether such operating expenses are bona fide and reasonable or extravagant. It is exceedingly difficult and frequently impossible to secure any reliable information on many of these items, but failure to make proper effort to secure information along these lines

from the parties interested would seem to invalidate any action by such a tribunal, when this point is properly raised in the courts.

That the burden of showing the cost of the business falls upon the railroad company in a judicial hearing before rates fixed by legislative authority can be disturbed is well recognized. *Seaboard Air Line R. R. v. Florida*, 203 U. S. 261; *Chicago, M. & St. Paul Ry. Co. v. Tompkins*, 176 U. S. 167, and *Minneapolis and St. Louis R. v. Minnesota*, 186 U. S. 257, affirming 80 Minnesota, 191; 83 N. W. 60.

It is constantly reiterated that such information as to actual costs cannot be obtained. That such a task presents many difficulties goes without saying. It is, as a matter of course, contended that it is impractical to furnish reliable data of this character. But in that connection an examination of the decision in *Smyth v. Ames*, of the decision in the United States Circuit Court in *Ames v. Union Pacific*, of the record made up in the case of *A. E. Buell v. Chicago, M. & St. Paul Ry. Co.* before the Railroad Commission of Wisconsin in 1906 and 1907, and the voluminous statistical tables submitted in the many cases before the Interstate Commerce Commission in recent years will show quite conclusively that the railway companies are able to furnish somewhat reliable data of this character when it becomes desirable from their standpoint.

The necessity for familiarity with matters demanding the most expert knowledge casts the responsibility upon the legislature to make a careful and exhaustive investigation or to provide special tribunals to handle this class of questions. The courts are perhaps less fitted to handle these subjects than are the ordinary legislatures.

Another fact worthy of note is that the handling of these affairs is so adjusted at present that, in actual practice, when the transportation company is defeated, it is generally able to have many of the same questions thrashed over in various judicial tribunals, with several chances of reversing the finding below, while the legislative tribunal has proven almost invariably to be the final court for the shipper, whether he succeeds or fails. This follows naturally from the operation

of the rule recognized by the courts that they cannot fix rates, but they can set aside rates which have been fixed; consequently where the commission fixes rates, the courts can set them aside, but where the commission refuses to fix rates the courts cannot act, for they have no power to fix rates. It is similar to that described in common parlance as a game of heads I win and tails you lose. If the legislative tribunal is going to be the final court for the shipper it should be the same for the transporter, with a possible resort to that exceptional protection guaranteed to all persons under our Constitution.

The case of *Interstate Commerce Commission v. Illinois Central R. R.*, 215 U. S. 452, involved an order of the Interstate Commerce Commission as to discrimination in the furnishing of coal cars. The language of the present Chief Justice in the opinion is significant upon the problem of how far the Courts will go in recognizing the conclusions of a commission. In the body of the decision, at page 470, is the following paragraph:

> "Beyond controversy, in determining whether an order of the Commission shall be suspended or set aside, we must consider, (a) all relevant questions of constitutional power or right; (b) all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and, (c) a proposition which we state independently, although in its essence it may be contained in the previous one, viz., whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. *Postal Telegraph Cable Company v. Adams*, 155 U. S. 688, 698. Plain as it is that the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed, and whose discharge may not be by us in a proper case avoided, it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon our con-

ception as to whether the administrative power has been wisely exercised. Power to make the order and not the mere expediency or wisdom of having made it, is the question."

This attitude toward the conclusions of Commissions on questions of the character described above, seems now to be well settled. The case of *Interstate Commerce Commission v. Illinois Central Railroad Co., supra,* was adopted as a controlling precedent in *Interstate Commerce Commission v. Chicago & Alton Railroad Co.,* 215 U. S. 479, and in *Baltimore & Ohio R. R. v. Pitcairn Coal Co.,* 215 U. S. 481. In the last named case, Mr. Justice White re-stated in emphatic language, that the expediency or wisdom of the order of the commission was not subject to review by the courts. The following sentence contains the gist of the principle:

"In considering Section 15 in the case of *Interstate Commerce Commission v. Illinois Central Railroad Co.,* just decided, ante, p. 452, it was pointed out that the effect of the section was to cause it to come to pass that courts, in determining whether an order of the commission should be suspended or enjoined, were without power to invade the administrative functions vested in the Commission, and therefore could not set aside an order duly made on a mere exercise of judgment as to its wisdom or expediency."

In a somewhat recent case is the following typical passage:

"The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference unless the act in question is unmistakably and palpably in excess of legislative power. *Jacobson v. Massachusetts,* 197 U. S. 11; *Mugler v. Kansas,* 123 U. S. 623; *Minnesota v. Barber,* 136 U. S. 313, 320; *Atkins v. Kansas,* 191 U. S., 207, 223." *McLean v. Arkansas,* 211 U. S. 539, 547.

Another clear statement of this same principle was made in *Chicago, Burlington & Quincy R. Co. v. McGuire,* 219 U. S., 549, 569, wherein Mr. Justice Hughes, for the Court, said:

"The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of *policy*. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance."

When the case arises squarely presenting the issue the Supreme Court may hold, as has been occasionally suggested in *dicta*, that merely nominal compensation to a public service corporation for service rendered is not a "just compensation," as provided for in the Constitution. At the same time it is remembered that there must be a taking of private property for public use, or confiscation, before that clause of the Constitution is applicable. Another argument worthy of notice, is that reference is often made to the power of the legislature to control rates of interest, and this seems to be a fair analogy theoretically. Yet practically there is a great difference. If the state of Ohio prescribes that 1 per cent shall be the highest rate of interest allowed, lenders of money can gradually withdraw their funds from the state, or take their security in lieu thereof. But investments in railroad property cannot be so readily withdrawn. For such reasons as these a great responsibility rests upon our commissioners and legislators not to endanger vast property interests.

Our courts can gradually compel these questions to be handled by competent special tribunals, and the circumstances would seem to justify such a course. The property interests involved, representing thousands of investors, demand that fundamentally right methods and principles should be followed in the investigation and fixing of rates. There are very many important matters that must be investigated if justice is to be done to all parties concerned. It is in this very necessity for elaborate and technical investigation by each member of a tribunal which attempts to fix a rate that the courts

have it in their power to compel such matters to be handled by an expert body. But such a method, if carried too far, could be very easily distorted into a means of practically nullifying all legislative action upon such matters.

As the law stands today, it may be safely stated that if a legislative tribunal, acting under a valid law, and following proper methods of investigation, fixes rates which are not confiscatory, those rates, in the absence of fraud, cannot be set aside by the courts as being legally unreasonable.

This condition of our law throws grave responsibility upon our legislators; but that merely illustrates a truism which is the characteristic of all representative government.

Our courts may feel that the legislatures and commissions make mistakes at times, and this condition of affairs may work a change in the law itself through the subtle agency of the court's own decisions, as suggested above. But is it not possible for even a court to be mistaken? Would it not be well for each department of our government to confine itself strictly within its own province? History records some undesirable occurrences at times, when the will of the people has been thwarted by one of their own creations.

For the sake of the security and permanence of our institutions it seems desirable to secure as great harmony as possible in defining the limits of legislative and judicial activity. Our legislatures are supposed to make the laws and our courts are supposed to interpret these laws. This is a distinction we have inherited from a thousand years of European civilization. A corresponding difference in the selection of these tribunals is that the courts are generally appointive, and the legislatures elective. But America has added a new element, which causes some confusion in its practical application. We have made the courts superior to the legislatures in one respect. We have empowered the courts to set limits upon the activity of our legislatures. This does not mean that these courts can decide when the legislatures act wisely, or unwisely, affirming the former and nullifying the latter. If that were true the courts would have to be considered practically an appellate legislature. That might be a desirable thing to

have; but it will be necessary to revise our constitution and form of government before this can be legitimately accomplished. There is one way this revolution can be accomplished without appeal to the machinery outlined in the constitution. That method would be for the courts themselves to very gradually absorb that function. The judiciary is the only part of our entire government framework that can decide the extent of its own jurisdiction. You say it cannot, for it is limited by the constitution? There you are face to face with the same old proposition—who shall interpret the words of that instrument? By a gradual extension in the meaning of words, or narrowing their limits, you can slowly but surely transform, enlarge, modify, or completely destroy the meaning of almost any statute written by man. We have seen an amendment to the constitution placed there largely for the protection of negroes expand and grow until it is now regarded by all of us as the protector of all forms of commercial enterprises in all kinds of industrial pursuits, with special application to public corporations, in place of colored folk.

Fifty-three years ago last summer Abraham Lincoln charged that a conspiracy to nationalize and perpetuate slavery had been deliberately planned and effected by the combined action of the Supreme Court of the United States, several Senators and the President of the nation. That conspiracy engaged in by the members of the United States Supreme Court, culminating in the memorable Dred Scott decision, probably did more than any other single occurrence to plunge this country into an expensive war.

Almost one hundred years ago Thomas Jefferson, while commenting on "Jarvis' Republican," said:

> "Our judges are as honest as other men, and not more so. They have, with others, the same passions for party, for power, and the privileges of their corps. Their maxim is, 'Boni judicis est ampliare jurisdictionem;' and their power is the more dangerous as they are in office for life, and not responsible, as the other functionaries are, to the elective control. The Constitution has erected no such single tribunal, knowing that, to whatever hands confided, with the corruptions of time and party, its members would

become despots. It has more wisely made all the departments co-equal and co-sovereign within themselves."

The eminent jurist, Dr. Hannis Taylor, of Washington, D. C., has recently expressed a similar idea concerning our Supreme Court. In discussing the extension of federal jurisdiction through judge-made law, he says:

> "The danger of that plan lies in the fact that the great Court, still strong in the confidence of the nation, may ultimately consider itself not so much a court as a supreme revising body armed with the power of correcting everything it considers an error, and of amending everything it considers a mistake. Have we nothing to fear from a judicial autocracy?"

If the majority of this Court had chanced to have decided with Justice Field in 1877, in the case of *Munn v. Illinois*, then this great tribunal would have received and would have merited most severe censure. Such an act at that time would have raised to fever heat the storm of sentiment and righteous indignation then spreading like prairie fire over our Western states. In 1877 railroad officials prophesied heart-rending tales of poverty and bankruptcy if the Granger Cases were decided for the plaintiffs. But the fact stares us in the face that since those decisions were rendered the railroads of this nation have made unparalleled strides in their progress. The growth of this enterprise has far surpassed every other industry known to man since the dawn of civilization.

Sovereignty in this country does not reside in any single tribunal. The people may make mistakes from time to time, for which they will and should suffer in due season. This is not a judicial oligarchy. The people are sovereign. The Courts must ever be mindful of that fact, if they would retain their present lofty eminence in our system of government.

Up to the present time the Supreme Court has steadfastly refused to encroach upon the functions of the legislature and legislative tribunals as outlined in *Munn v. Illinois*.

The history of all nations shows us that any tribunal which has the power to do so, will gradually extend its jurisdiction farther and farther until restricted by some other force. The

almost inevitable result has been that some person or institution becomes supreme in every land. Seldom has it been possible for a part of the government which had no superior to voluntarily limit its own functions. In America this strange experiment is in process of demonstration. If we succeed it will be a permanent source of strength ensuring the stability of free and representative institutions.

This example of the Supreme Court, which alone has no superior to define the limits of its activity, the refusal by this august body to gradually extend its jurisdiction over functions exercised by another department of our government, is a profound example of judicial wisdom, and should not be departed from in this case.

Judge Sanborn and Mr. Otis are not a Railroad and Warehouse Commission. They have mistaken their true functions. The course pursued by the lower court in this case, if followed in the many cases of this character brought by railway companies in the Federal Courts during recent months from one end of the country to the other, will immediately transform this Court into an appellate railroad commission.

The presumption of this Court at this time is that the conclusions of the Minnesota Railroad & Warehouse Commission were correct, and the burden in this Court of overthrowing that presumption rests upon the carriers. The lower court gave no heed or consideration whatsoever to the methods pursued and conclusions reached in the original investigation by the state commission.

Judge Sanborn treated the entire matter as if it were a trial *de novo* before the Federal Court, giving no more consideration to the Commission or its conclusions than he would to any other litigant in an ordinary case tried before him. This policy upon the part of Federal Courts has been pursued during the past few months all over the country. If continued, it must necessarily result in making our Federal Courts an appellate tribunal for all railway commissions, all public utility commissions, all city councils, and all legislatures, in the nation, including the United States Congress.

If the Minnesota Railroad & Warehouse Commission did in fact fail to consider certain facts which should have been investigated, under a mistaken conception of what facts and circumstances the law required them to consider, or did not pursue correct methods of investigation, or adopted fundamentally wrong principles, then the better rule would be for the lower court to remand the case back that they might proceed in accordance with law. This would be in strict accordance with the course of procedure outlined as to the Interstate Commerce Commission by this Court in the case of *Texas & Pac. Ry. v. I. C. C.*, 162 U. S. 197, 238, and subsequent decisions which have entirely confirmed that rule.

In *Louisville, etc., v. Behlmer*, 175 U. S. 648, the petitioner was a private party seeking to enforce an order of the Commission. The Court found that the Commission, under a mistaken view of the law, had failed to consider and weigh certain circumstances and facts which they should have considered. The Circuit Court sustained the action of the Commission on this erroneous basis. "It follows," says the present Chief Justice, "that the decree of the Circuit Court must be reversed unless it be the duty of this Court to examine the evidence, which was not passed on by the Commission or the Circuit Court of Appeals," necessary to determine the question at issue. Upon this question squarely raised the Court makes the following comments:

> "If, then, we were to undertake the duty of weighing the evidence, in this record, we would be called upon, as a matter of original action, to investigate all these serious considerations which were shut out from view by the Commission, and were not weighed by the Circuit Court of Appeals, because both the Commission and the Court erroneously construed the statute. But the law attributes *prima facie* effect to the findings of fact made by the Commission, and that body, from the nature of its organization and the duties imposed upon it by statute, is peculiarly competent to pass upon questions of fact of the character here arising. In *Texas & Pacific Railway v. Interstate Commerce Commission*, (*ubi supra*,) the court found the fact to be that the Commission had failed to consider and give weight to the proof in the record, affect-

ing the question before it, on a mistaken view taken by it of the law, and that on review of the action of the Commission the Circuit Court of Appeals, whilst considering that the legal conclusion of the Commission was wrong, nevertheless proceeded as a matter of original investigation to weigh the testimony and determine the facts flowing from it. The Court said (p. 238):

"'If the Circuit Court of Appeals was of opinion that the Commission in making its order had misconceived the extent of its powers, and if the Circuit Court had erred in affirming the validity of an order made under such misconception, the duty of the Circuit Court of Appeals was to reverse the decree, set aside the order, and remand the cause to the Commission, in order that it might, if it saw fit, proceed therein according to law. The defendant was entitled to have its defense considered in the first instance, at least, by the Commission upon a full consideration of all the circumstances and conditions upon which a legitimate order could be founded. The question whether certain charges were reasonable or otherwise, whether certain discriminations were due or undue, were questions of fact, to be passed upon by the Commission in the light of all facts duly alleged and supported by competent evidence, and it did not comport with the true scheme of the statute that the Circuit Court of Appeals should undertake, of its own motion, to find and pass upon such questions of fact, in a case in the position in which the present one was.'

"We think these views should be applied in the case now under review. In this case, however, the proceeding to enforce the order of the Commission was initiated by a private individual on behalf of himself and other interested parties not named, and the petitioner in the Circuit Court has died since the argument and submission of the cause in this court. We are of the opinion, therefore, that

"The decree of the Circuit Court of Appeals should be reversed with costs, that the case be remanded to the Circuit Court with instructions to modify its decree adjudging that the order of the Commission be set aside with costs, by providing that the dismissal be without prejudice to the right of a party in interest to apply to the Commission to be substituted in the original proceeding, before the Commission in the stead of the deceased petitioner, and that upon such substitution the Commission should proceed, upon the evidence already introduced be-

fore it or upon such evidence and any additional evidence which it might allow to be introduced, to hear and determine the matter of controversy in conformity to law. A decree will be entered accordingly, such entry to be made *nunc pro tunc* as of the date of the submission of the cause in this court."

In *East Tennessee, etc., v. I. C. C.*, 181, U. S. 1, 26, the action was brought by the Commission to enforce its order. The lower court sustained the finding of the Commission on other grounds than those adopted by the Commission. In regard to this, Mr. Justice White, writing the opinion of this Court, stated:

> "Without taking at all into view the legal propositions announced by the Circuit Court of Appeals in its opinion, and conceding, without passing upon such questions, that they were all correctly decided, it is plain that all the premises of fact upon which the propositions of law decided by the Circuit Court of Appeals rest are at variance with the propositions of fact found by the Commission, in so far as that body passed upon the facts. From this it results that to decide the case in the aspect in which it is now presented we would be obliged to go into the whole evidence, as a matter of original impression, in order to determine the complex questions which the case presents."

Then follows a statement of the facts to be considered, with this comment upon the same:

> "To state these issues is at once to demonstrate that their decision, as a matter of first impression, properly belonged to the Commission, since upon that body the law has specially imposed the duty of considering them. Whilst the court has in the discharge of its duty been at times constrained to correct erroneous constructions which have been put by the Commission upon the statute, it has steadily refused, because of the fact just stated, to assume to exert its original judgment on the facts, where, under the statute, it was entitled, before approaching the facts, to the aid which must necessarily be afforded by the previous enlightened judgment of the Commission upon such subjects. This rule is aptly illustrated by the opinion in *Louisville & Nashville Railroad Co. v. Behlmer*, (1900), 175 U. S. 648, in which case, after pointing out the

same error of construction adopted and applied by the Commission in the present case, the court declined to undertake an original investigation of the facts, saying (p. 675):

Here the court makes the extended quotation from the Behlmer case given above, and enters the following decree:

> "The decree of the Circuit Court of Appeals should be reversed with costs and the case be remanded to the Circuit Court with instructions to set aside its decree adjudging that the order of the Commission be enforced, and to dismiss the application made for that purpose with costs, the whole to be without prejudice to the right of the Commission to proceed upon the evidence already introduced before it or upon such further pleadings and evidence as it may allow to be made or introduced, to hear and determine the matter in controversy according to law."

In *Texas, etc., Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 443, 444, the question of the true province of the Commission was in issue. Commenting and interpreting the former decisions relative to the question, the opinion of the court says:

> Said cases "involved the enforcement against carriers of orders of the Commission. After deciding that the orders of the Commission were not entitled to be enforced, because of errors of law committed by that body, this court declined to consider the question of the reasonableness *per se* of the rates as an original question; in other words, the correction of the established schedule without previous consideration of the subject by the Commission. It was pointed out that by the effect of the act to regulate commerce it was peculiarly within the province of the Commission to primarily consider and pass upon a controversy concerning the unreasonableness *per se* of the rates fixed in an established schedule. It was, therefore, declared to be the duty of the courts, where the Commission had not considered such a disputed question, to remand the case to the Commission to enable it to perform that duty, a conclusion wholly incompatible with the conception that courts, in independent proceedings, were empowered by the act to regulate commerce, equally with the Commission, primarily to determine the reasonableness of rates in force through an established schedule."

The court, in the opinion of *Illinois Central, etc., v. I. C. C.*, 206 U. S. 441, discussed the cases cited above, and distinguished them from the one under consideration on the ground that the Interstate Commerce Commission had made mistakes of law in said cases, concluding the opinion as to the record in the case then under consideration in the following words:

> "The testimony was voluminous. It is not denied that it was conflicting and, by concession of counsel, it included a large amount of testimony taken on behalf of appellants in support of the proposition contended for by them. Whether the Commission gave too much weight to some parts of it and too little weight to other parts of it is a question of fact and not of law. It seems from the findings, report and conclusions of the Commission that it considered every circumstance pertinent to the problem before it."

The Commission was sustained.

In the pending cases, the railway companies did not attack the orders of the Commission because of inconsiderate action, or improper methods of investigation, or fraud. They permitted most of the rates to go into effect, and after a given period of time they attacked these rates in the lower court. It is thought that this delay changes the relative function of the Commission, so that it becomes merely one of two or more contesting litigants, instead of a tribunal of experts with special functions whose conclusions are binding upon the courts on all matters save those enumerated above.

To fairly and intelligently handle these many questions of expert and technical character, the courts will have to become tribunals of rate experts, civil engineers, and accountants, and traffic officials, as well as judges of what is wise public policy, exercising thereby the functions of legislators which have in fact been transferred, in a *quasi* manner though legal, to these commissions.

A fair and true statement of the gist of the entire series of recorded decisions of this Court upon these issues, can be briefly summarized in that one passage quoted above, from

San Diego Land and Town Co. v. Jasper, in which Mr. Justice Holmes said, *"We do not sit as a general appellate board of revision for all rates and taxes in the United States. We start with considering whether it clearly appears that the Constitution of the United States has been infringed, together with such collateral questions as may be incidental to our jurisdiction over that one—in a case like this, we do not feel bound to re-examine and weigh all the evidence, although we have done so, or to proceed according to our independent opinion as to what were proper rates. It is enough if we cannot say that it was impossible for a fair minded board to come to the result which was reached."*

In the light of this long series of decisions, extending over a period of 34 years, it can be safely stated that the law at present, as evidenced by controlling precedents, is that where a legislative tribunal is admittedly acting within its general statutory powers, the Court will consider the entire record *de novo,* only for the purpose of finding if there is any evidence.

First, that fraud existed in the actions of the legislative tribunal;

Second, that improper methods of investigation were pursued;

Third, that the said tribunal based its conclusions upon principles which are so fundamentally wrong that a fair minded body of men could not have reached the same conclusion.

In this case pending before you at this time, there is nothing whatever in the opinion of Judge Sanborn indicating or suggesting in the slightest manner: that there was any fraud in the action of the Minnesota Railroad and Warehouse Commission or legislature; or that improper methods of investigation were pursued.

The only question remaining is whether such fundamentally wrong principles were adopted by the said Commission or legislature, that a fair minded body of men could not have reached the same conclusions as those arrived at by these tribunals; to intelligently discuss and consider this phase of the case, will

require a careful analysis of the methods and conclusions of the lower court. At times we may be forced into expressions which may give the impression that the lower court had taken the place of the legislature and that its findings have the force of the conclusions of a commission specially created for the determination of such issues. Notwithstanding this apparent attitude on our part, as a matter of fact, the sole purpose of such a discussion of the lower court's findings is to ascertain if a reasonable man could have reached the same conclusions which the Minnesota Railroad and Warehouse Commission and the Minnesota legislature did in fact arrive at, and if that is found to be true, then the orders of the State authorities must be sustained by this Court; but if the said Minnesota authorities did not take into consideration such facts as the law requires, then these cases should be remanded back for further investigation in harmony with the decisions of this Court, cited above.

The many conflicts of opinion between the lower court and the Minnesota authorities can be readily passed upon, as they must be resolved in favor of the latter. The different propositions which we will consider will be discussed solely upon the theory that this Court may deem any of the same to be fundamental, and therefore this Court must determine the correctness of such principles.

PART III.

THE RECORD IS DEFICIENT IN THAT IT FAILS TO GIVE THE FACTS NECESSARY TO DETERMINE ACTUAL EXPENSES, BUT LEAVES THE SAID ITEM TO A MERE GUESS BASED UPON CONJECTURE AND UNBOUND OPINION EVIDENCE.

In all of the cases before the court a very large percentage of the testimony of the various witnesses presented by the railroad companies was devoted to the justification of their methods for apportioning to the state certain revenues, to their method of determining the revenues produced within the state of Minnesota from the intrastate business, to the methods used for apportioning the expenses as between the system and the state where they were not directly allocated, and the then further assignment or apportionment of the expenses as between freight and passenger, preliminary to the final apportionment of the said expenses between the intrastate and interstate traffic of the freight and passenger business. In much of this latter matter, it is unfortunate that the figures were not developed in full detail, and that there is apparent consent on the part of the state to accept, without proof, apportionments made by the railroads, which an analysis would prove to have been erroneous.

We shall not attempt in this brief to analyze the testimony of the witnesses for the state further than to say that the absence of many of the most essential facts necessarily hampered them much and placed them at all times at great disadvantage, in that facts which should have been freely and frankly disclosed by the railroads were withheld and not available to the state.

The application of our argument will necessarily have to be made, excepting in one or two instances of glaring discrepancies, to the figures as they are presented in the record. In this connection, particularly, the question of division between

freight and passenger expenses of Maintenance of Way and Structures becomes of vital importance and is the principal cause for quarrel as to the ultimate showing of net operating revenue in the passenger traffic. This will be treated in some detail under its proper heading.

The finding that it costs to transport intra-state business two and one-half times what it costs to transport inter-state business is not substantiated by the record, is misleading and is not true.

Great harm was perpetrated on the state in this case in the alleged excess of cost of transacting the intrastate freight business over the cost of conducting the interstate freight business of the companies within the state of Minnesota. In order to avoid confusion, the treatment of these subjects in the brief will be applied more directly to the figures of the Northern Pacific case. All the companies use practically the same method, adopt the same general plan, and insist on substantially, if not in the minutest detail, the various reasons for the ratio and the manner of making application of the alleged extra cost for intrastate traffic. The Northern Pacific and the Great Northern traverse pretty much the same class of territory in Minnesota, and operate under about the same relative conditions, except, however, that the Great Northern, in the operation of its Mesabi division, includes features which disturb the general averages to a very large degree. The traffic on this division represents a very large percentage of its entire tonnage at a very low rate of revenue, and is, by their own witnesses in many of their comparisons, excluded from some of the exhibits because of the acknowledged abnormal conditions obtaining. With this division taken out, the general operation of the two companies named becomes more nearly the normal operating condition as compared to each other. How far different this Mesabi branch is than the general average is readily observed by reference to the Great Northern exhibit 53 Ward, which demonstrates that, while this Mesabi division represents only about 16 per cent of the road mileage within the state of Minnesota, the freight ton-

nage carried represents 38 per cent of all the revenue ton miles within the state of Minnesota. Of the 801,517,692 revenue ton-miles hauled on this division 575,234,319 ton miles, as shown in Ward's exhibit 53, were for the hauling of iron ore, with an average haul of 91.8 miles, producing a gross revenue of only 4.42 mills per ton per mile. While in a few of the exhibits, as stated, separation is made between this abnormal operating division and the rest of the Great Northern road within the state of Minnesota, it is not done throughout the exhibits and, therefore, this causes it to be impossible to make the necessary comparisons and calculations with this excluded. It will also be noted from this exhibit that the relationship of the intra to interstate ton miles shows a very wide divergence, the intrastate ton miles on the Mesabi division being .77 of one per cent of the whole, whereas, on the other divisions, with the Mesabi division excluded, the intrastate ton miles form 14.35 per cent of the whole.

The testimony of the witnesses for the railroads can not be accepted by this Court as satisfying the rule repeatedly announced that "Evidence as to the confiscatory character of rates must be so clear and convincing as to remove all doubt, that it must be full and persuasive, and the burden must be taken and borne by the railroad complaining."

It will be shown to the satisfaction of the court that none of the conditions named have been complied with by the railroads, that the testimony as to many of the essentials is conjecture, inconsistent, contradictory and insufficient. On such testimony this Court has frequently decided, rate statutes will not be set aside.

In *Knoxville v. Knoxville Water Co.*, Mr. Justice Moody says:

> "The courts, in clear cases, ought not to hesitate to arrest the operation of a confiscatory law, but they ought to refrain from interfering in cases of any other kind.—It is a delicate and dangerous function, and ought to be exercised with a keen sense of justice on the part of the regulating body, met by a frank disclosure on the part of

the company to be regulated.—The companies to be regulated will find it to their lasting interest to furnish freely the information upon which a just regulation can be based."

In beginning his discussion of the issues Mr. Justice Moody states:

> "At the threshold of the consideration of the case the attitude of this court to the facts found below should be defined. Here are findings of fact by a master, confirmed by the court. The company contends that under these circumstances the findings are conclusive in this court, unless they are without support in the evidence or were made under the influence of erroneous views of law. We need not stop to consider what the effect of such findings would be in an ordinary suit in equity.—In cases of this character this court will not fetter its discretion or judgment by any artificial rules as to the weight of the master's findings, however useful and well settled these rules may be in ordinary litigation. We approach the discussion of the facts in this spirit." *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 7, 8.

As heretofore stated, one of the principal features in these cases, which becomes of paramount importance, is the assessment of alleged extra cost to intrastate business in the conducting of the freight traffic and the basis for the application of such extra cost when it shall first have been determined. We claim, and feel sure that we can satisfy the court, that there is utter failure on the part of the railroads to substantiate the exorbitant claim which they make in this regard, and, except as to one or two minor items, they utterly fail to uphold any of their conjectures and opinions with figures or statistics upon which any reliance can be placed.

Mr. Howard Elliott, the president of the Northern Pacific, was their principal witness, introducing exhibit No. 80 on the accounting question, notwithstanding that he had in his employ eminent accountants. He says (Nor. Pac. pp. 3152, 3154) that he did not prepare them himself nor were they prepared under his direction. Many of his conclusions are based on this exhibit.

Mr. Gray, the comptroller of the road, who was one of the principal witnesses on this subject in the Missouri cases, now before this court, was not called on for the slightest testimony in behalf of his own road on this part of the accounting.

Mr. William G. Johnson, the assistant comptroller, and who prepared the statistics and statements introduced by Mr. Elliott, did deliver considerable testimony along the same line as that delivered by Mr. Elliott, but in some of the essentials did not agree with his superior officer.

The best exposition of Mr. Elliott's ideas, leading up to his conclusion as to the extra cost for intrastate over the interstate business, is made in the printed record, volume 7, page 3127, et seq. to page 3151, on direct examination. Many of the elements claimed by Mr. Elliott to be factors which control in the matter of taxing extra cost to traffic on the local trains as against the through trains will be conceded by any one knowing the operating conditions which obtain on railroads, but the degrees are an entirely different matter, and, as given by him, are merely his opinion and not justified by actual demonstrations, figures, or statistics which were at his command and in the possession of the railroad and available if they desired to produce them. Practically at the beginning of his explanation (Nor. Pac. Record, p. 3128) he says:

> "To begin with, we have the fact already stated, that the average haul of the state business is 104.52 miles as compared with 485.3 miles for the interstate business; and this in itself is one most potential element in the direction of higher cost."

And after following in minute detail the next 16 or 18 pages, covering his explanation, it will be found that in the end this proposition of the difference between the long and the short haul is the real basis which he finally adopts and concludes to be the figures which will express the ratio that ought to be applied as between the cost of the intrastate and interstate freight traffic. We have confidence that this court will concede that when figures are used to express ratios, the figures which actually bear relation to each other should be used.

In this case it is not done. Mr. Elliott says positively that he compares the average haul of the intrastate business within the state of Minnesota to the average interstate haul on his whole line of all interstate freight business touching Minnesota, and not the haul of the one compared to the other in Minnesota, as will be seen by reference to exhibit No. 80. Mr. Elliott reiterates this statement at various points in his testimony. (Nor. Pac. Record, pp. 3125, 3128, 3172, 3188, 3195, 3198.)

The character of his testimony is clearly shown in his answers to the following:

"Q. Did you not say in your testimony that, in your judgment, the short-haul intrastate business cost per ton mile from three to six or seven times as much as the long-haul interstate business?

A. Yes, sir.

Q. Were you not at that time comparing the most expensive class of state business with the least expensive class of interstate business?

A. That is correct.

Q. You just said you were not, that you were depending upon your general experience.

A. You asked me how I came to my conclusions; I told you. When you talked about comparisons I was comparing. But the short-haul interstate business is just as expensive as the short-haul state business.

Q. You have made no statement, then, in your testimony, as to how much more the state business, as a whole, costs per ton that the interstate business, as a whole?

A. I have not made such a statement, no, sir. I said this, that the—

Q. And you are unable to make any such statement as that, are you not?

A. May I answer the question?

Q. Well, will you answer my question: You are unable to make any such statement as that, are you not?

A. I stated, in the early part of my testimony, that I knew of no way that you could subdivide the accounts so as to show the exact cost of the state business and your interstate business.

Q. And you have made no attempt to subdivide it?

A. I have made none, no sir.

Q. And you are at this time unable to say what it costs you to transact the freight business, within the state of Minnesota?

A. I am unable to say, sir, yes." (Nor. Pac. Record, pp. 3173, 3174).

Mr. Johnson, on his cross examination in volume 8, page 4112, said that he based his estimate contained in the affidavit before the Railroad and Warehouse Commission of Minnesota, wherein he said that the cost of conducting the intrastate business would be at least two and one-half times the cost of conducting the interstate business, on the relationship of the long haul of the business of the company, meaning principally the Pacific Coast business, as compared to the haul of the intrastate business within Minnesota. He says:

"Q. You had in mind this—Minnesota business as whole should have one class; that is, Minnesota intrastate business as a whole as one class?

A. Yes, sir.

Q. And the through business as to the system, such as the lumber freight from the coast to the Twin Cities as the other class?

A. Yes, sir. The long-haul business as we term it." (Nor. Pac. p. 4113.)

A reference to exhibit 80 discloses the fact that the average haul of all interstate freight traffic within Minnesota was 185.86 miles, and the average haul on the intrastate freight business within Minnesota was 104.52 miles.

In exhibit 79, there are, by this witness, definitely allocated to the state of Minnesota all the expenses alleged by him to have been incurred in the conduct of *all* the business in Minnesota, both freight and passenger, intrastate and interstate, and there is assigned to the state of Minnesota, and included, what is in their opinion a proper apportionment of common to line expenditures not made within the state, but a share of which should be borne by the state on the various bases adopted by them. So that, in considering the relationship of

the traffic within the state, it is unfair, when that traffic has borne every dollar of expense which they could possibly find and justify themselves in charging against it, to set up the relationship of the expense on that theory and claim the advantage to themselves of showing the great disparity in average haul by taking the average long haul over the entire system as against the intrastate haul within the state of Minnesota.

Rightfully these expenses on the interstate hauls should not be confined to the portions of such interstate hauls within the state of Minnesota. These expenses should be distributed over the entire system. The Master confines all these expenses, terminal, etc., to the state of Minnesota, and then he apportions this entire expenditure between state and interstate business on a basis of two and one-half to one.

This glaring inconsistency can best be shown by a concrete illustration. Take the terminal cost which Mr. Elliott, President of the Northern Pacific, says "is one most potential element in the direction of higher cost." (Nor. Pac. 3128.) It evidently costs as much to load a ton at St. Paul destined to a point outside of the state 125 miles from St. Paul, as a ton destined to a point inside of the state 50 miles away. Suppose the ton on the interstate trip, travels 60 miles before it crosses the state line; and that the total terminal costs of the two tons at St. Paul were 37 cents, or 18½ cents each. The terminal cost on the intrastate haul would be distributed over 50 miles, and on the interstate haul would be distributed over 125 miles; in other words, the cost caused by the use of the terminal at St. Paul of the ton hauled inside of the state, this cost per ton mile would be two and one-half times the cost per ton mile of the interstate haul, because in the latter case the same terminal cost would be distributed over a haul two and one-half times as long in miles. It may be assumed that the terminal costs averaged two mills per ton mile on the interstate haul, and five mills per ton mile on the state haul, this preserves the proportion stated. So far it all seems plausible. The next step is where the fatal mistake occurs.

Mr. Elliott in this same connection, there are many which, without doubt, if proven would produce a difference in the cost of the two classes of traffic under consideration, but in no case would they show that wide difference in cost which he claims. His comparisons, however, are not as to intrastate and interstate, which he says he is unable to make, but are as between local and through trains. (Nor. Pac. pp. 3173, 3174.)

Mr. Elliott indulges in a long list of generalizations, broad and sweeping in character, to justify the arbitrary proportions claimed by him. The most effective way to examine these generalizations is to test them here and there by concrete facts shown in the record.

Following the speech of Mr. Elliott (Nor. Pac. p. 3128) and taking up now the various items in the order of his recitation, we strike first his marvelous claim that the short haul business uses up most valuable terminal facilities in order to obtain its proper handling from the larger distributing centers, and that the state traffic uses these facilities to a greater extent for the tons handled than the through business. The intrastate freight traffic in Minnesota was about twelve per cent of the total traffic within the state, and a very large percentage of this traffic was handled at the small way stations through the state. Surely no one will claim that such terminal facilities are what he characterizes as the most valuable terminal facility. If there was any real foundation for this claim, the figures for proving it definitely were available to the railroad companies, but they do not appear. The figures generally as to the handling of all traffic and the various classes of traffic at these terminals, are kept in great detail in the accounting departments of the railroads, and, as is proven by numerous exhibits introduced, when the railroad considers them to be material to the substantiation of their own case, they are very readily produced.

His next claim is with regard to the use of space by the intrastate traffic, thereby depriving the railroad of the use

of valuable facilities for the long haul business, loading much heavier. His statement is either an exaggeration or a pure guess. A reference to the annual report of the Northern Pacific for the year ending June 30, 1908, in volume one of the transcript, discloses the fact that the average number of tons per loaded car mile within Minnesota for that year were 18.48 tons and for the system 18.86 tons, so that in this the Minnesota and system traffic were nearly equal.

Beginning at page 3130, he details at very great length the difference in cost, because of various reasons, given between the carrying of traffic on local and through trains. We challenge the court's attention particularly to this matter at this point, because it is a matter of vital importance and, as acknowledged by him later on in the testimony to which we will call attention, the comparison is not made as between the cost of carrying the intrastate traffic in Minnesota and the interstate traffic within the state, but as between the so-called *local* and *through trains* which are terms far from being synonymous with intrastate and interstate as railroad managers generally would like to have us believe. It must be borne in mind that the total intrastate ton miles within Minnesota on this road for the year under consideration were about 12 per cent of all the ton miles carried within the state of Minnesota, and, as is frequently acknowledged by Mr. Elliott and other witnesses throughout the testimony, the local train carried both intrastate and interstate traffic, and the through train also carries both intrastate and interstate traffic, and until the company discloses to the commission or to the court, the proportions of the two classes of traffic carried on each of the two classes of trains, it is absolutely impossible to reach a definite conclusion as to the relationship of the traffic and what part of the intrastate business should have applied to it the larger cost of conducting the local trains, and as to what part of this intrastate traffic, by reason of being carried on through trains, should participate in the lower cost of carrying the traffic on such through trains. In this connection, the attention of the court is directed to the fact that of the entire traffic within the state of Minnesota, not to exceed

12 per cent is so-called trans-state traffic, leaving 76 per cent of all the traffic which enjoys the terminal facilities within the state, and, in accordance with the general scheme of handling traffic, must, of necessity, to a very great extent, be carried on local trains.

These same arguments can, in general, also be applied to Mr. Elliott's statement of the suitable warehouses in country terminals. How can it be definitely determined what percentage of excessive cost should lie against the intrastate business without first definitely determining the ratio as between the amount of intrastate and interstate tons handled within the terminal referred to? The cost for the unit of tonnage handled within such warehouse is absolutely the same whether intrastate or interstate. The clerk who makes the waybill or expense bill, and the laborer who trucks the shipment does not stop to ask whether the shipment he is billing or handling is intrastate or interstate, and no fair-minded man can possibly claim, with the hope of having his statement credited, that any difference will apply except only in the ratio of the tons as they are handled. It seems to be the theory injected into the record over and over again, and particularly at this point of the record in Mr. Elliott's testimony (Record, p. 3130) that the long haul business has no costs attached for any terminal handling or accounting except only at the initial point and point of destination; but every waybill and every car must be checked and accounted for at every terminal or yard through which it passes on these pretended low cost long haul shipments. The conductor takes his waybills and checks them in to the yardmaster, who, in turn, delivers them to his clerk, where a complete record is made of their receipt of the car and, in fact, the entire history of the transaction showing point of origin and point of destination. Then, after the train is switched and remade, or whether the train is left intact without switching the same, the same office work is again performed at the secondary originating point for the next part of its journey, and so on through every train terminal that the train makes. At these points, sometimes found in small towns whose business would not justify

the keeping of a single switch engine, a yard force and switching crews are maintained which would handle more than one hundred times the business which originates, or is destined to the place under consideration. On what theory can it possibly be claimed that any part of this enormous expense to the railroads should apply to any other traffic than that traffic which passes through and receives the service at such train terminals. These terminal yards occurring at frequent intervals, include round houses, yard offices, and clerical force, many switching tracks, often covering many acres of ground which, if it were not for the through traffic would not be there at all. There are on the Northern Pacific main line between the Twin Cities and the Pacific Coast about seventeen train terminals. It must always, however, be borne in mind, even with these exaggerated statements as to the difference between the long haul traffic and the short haul traffic, the one being credited with receiving only the services of the through trains, and the other being carried entirely on local trains, that practically all the long hauls will either originate or terminate away from a terminal point and thus also receive in part some of the more expensive service of the local train and, on the other hand, much of the so-called short haul traffic extending over more than a full division will receive as a part of its service some of the cheaper handling incident to being carried on the through train. But in all this the fact must not be lost sight of that this does not make division, or differentiate between, the intrastate and the interstate business. It is conceded by every witness who has been on the stand for the railroads that both classes of trains carry both classes of business. And, even if the excess cost of the local train service over that of the through train service were definitely and reasonably found and determined, the court is still at a loss for determining the ratio in which these costs should be applied as between intra and inter, because notwithstanding that the facts are in the hands of the railroads and available to them if they choose to expose the conditions, this record is absolutely silent as to the proportions of intrastate and interstate traffic carried on the local trains and as to the

proportions of these same two classes of traffic carried on the through trains.

The next claim made by Mr. Elliott (Nor. Pac. p. 3130) is that there is: "generally a larger movement of empty cars in one direction or the other for handling the local intrastate business." Coupled with that is the claim for the necessity of allocating a larger number of cars per ton of freight on local business. A reference to complainant's exhibit 93, Johnson, discloses that the empty car movement within the state of Minnesota for the year under consideration was 21 per cent of the total car movement. A reference to the annual report for the same year discloses an empty car movement which is 19.2 per cent of the whole car movement on the system. This certainly does not disclose such a wide difference as Mr. Elliott would have us believe. It must be remembered, too, in this connection, that exhibit 93 discloses all the car movements in Minnesota, and there is no attempted separation as between interstate and intrastate business. The record does not give us an opportunity to specifically controvert this argument, but in the exhibit marked "Exhibit 1," Master, there is disclosed the proportions of certain commodities handled within the state of Minnesota divided between intrastate and interstate traffic. It will be noticed that of all the hard coal hauled by the Northern Pacific in October and April, 1906, taken as representative months, 77.9 per cent of the tons were intrastate. Of the soft coal, over 80 per cent of the total; of the grain over 47 per cent; and of the live stock, nearly 92 per cent. As to the coal and grain, it is a well known fact that they are commodities which take the extreme limit of heavy loading, and this is further borne out by the fact disclosed in Staples, Exhibit No. 3G and No. 3H, showing in the one instance 114,874 cars of wheat with an average loading of 65,820 pounds (nearly 33 tons), and in the second instance 22,518 cars with an average loading of 71,616 pounds (nearly 36 tons). The same exhibit discloses the average weights on oats, corn, rye, barley and flax, and the average was in excess of 27 tons. There is no such loading on the average traffic for the system, where the average was, as

heretofore shown, 18.86 tons per loaded car mile. His argument there, like in many other places when brought face to face with the meager facts presented, falls absolutely flat.

As to the next contention, that the local trains can only handle from 40 to 60 per cent of their capacity, we have no proof in the record which will substantiate such a statement. We merely have Mr. Elliott's opinion, which does not conform to his claim made elsewhere in the record of high efficiency of management; but, even if it were proven that the local freight trains carried approximately only half loads, the problem is still far from a solution, as we have in this respect no testimony or statistics in the record whereby it might be determined what proportion of this lack of efficiency shall be charged to intrastate and to interstate freight traffic respectively; neither have we any figures which show the cost of moving freight on local trains as distinguished from the cost of moving freight on through trains. These things must be known and clearly set out before opinion evidence of the kind here given by Mr. Elliott can be given much weight, and without such knowledge, or at least clear proof that the statistics are not available or cannot be obtained, the mere opinion of a witness will not suffice to invalidate state legislation, especially when such opinion contradicts testimony given by himself and other witnesses for the railroad company elsewhere in the record.

His next complaint on this local train service is because of the greater wear and tear on account of increased switching. It is a matter of common knowledge that most of the switching and the damage resulting to equipment occurs in the terminal yards, and on the through trains every car that runs across the entire line will receive from 15 to 20 handlings, whereas such handling within the state of Minnesota will seldom exceed two switching services. There is nothing in the record or in any of the exhibits tending to show that there is any greater proportion of switching service or handling in the state of Minnesota than on the line generally. The density of traffic and manner of conducting the business generally

within the state of Minnesota would, on the other hand, tend rather to prove that there would be less here than the average.

A rather peculiar argument is next made by Mr. Elliott (Nor. Pac. p. 3131) wherein he says, continuing the argument: "It is an unfortunate fact that in Minnesota the arrangement of the smaller country stations and the industries surrounding them have grown up more or less haphazard, with the result that the amount of shifting of cars is very large." But, wherein does he touch the subject here vital to the settlement of this question of what proportion of this extra cost shall be charged against the interstate and what against the intrastate. All these industries receive and ship both classes of freight, and the testimony clearly shows (Exhibit 80, Elliott) that the intrastate tons handled are only about 20 per cent of the total tons handled in Minnesota. It is on just such arguments as this, given at great length throughout the testimony for the purpose of proving his theory, that Mr. Elliott's claim is made that it costs from three to seven times as much to handle the intrastate business as it does the interstate business. The quesion would naturally arise as to whether this "unfortunate" situation obtains in Minnesota only and is not the same on the rest of his system. But he forgot to enlighten the Master as to this.

His next "regret" is in the alleged fact that "many of the so-called local trains, in order to increase the facilities of travel, permit the handling of passengers, which is a very bad practice from an economical railroad standpoint." We are not enlightened as to whether he has been coerced by law or whether it is because of his own convenience that he forces passengers under these conditions to travel in an uncomfortable and unsafe way-car or caboose. His claim in this connection is that it produces much additional risk in handling passengers and tells us at great length, following this, (Nor. Pac. p. 3132), of some of his experiences in paying damages. But we have not yet found out whether the passengers are intrastate or interstate, or whether the train on which they were traveling carried all interstate, or intrastate travel, or

only a part of each, and what, if so, was the ratio. A reference to exhibit 79, Elliott, shows the total cost for injuries to persons under transportation expense to be $144,852.29, which is 1.9 per cent of the entire expenses for the year in Minnesota. The ratio on the entire system is 1.8 per cent, and because of the possible difference between the amount chargeable to intrastate and interstate, which, however, is not shown, Mr. Elliott would have us believe that for just such reasons as this there should be charged from three to seven times as much for carrying the intrastate freight as is chargeable against the interstate freight. Further along in this same argument (Nor. Pac. p. 3132) he laments the fact that the local train "opens the door..... to increased stealage and pilfering." Further "it is a sad fact, but we cannot get absolutely honest men, and we lose a great deal more from the way freights than we do on through trains, all of which tends to increase your costs." It must be noted again along this line that the through trains will pass through many more train terminals proportionately than the local trains, and that for them the door he mentions is more often open than for the other. But, again, where is the differentiation here between the intrastate and interstate freight?

It is true, as he says (Nor. Pac. p. 3133) that "the wages of the employees on the local trains are, in the main higher than on the through trains." But here again, the real reason for this is withheld from the court. In part, of course, the extra pay is because of the fact that the local freight train crews perform service which is not performed by the through freight crews in the handling of traffic and the switching of cars, but, as he discloses in another part of the record, the greater reason for the extra pay is because of the fact that the local freight train crews are expected to, and do, stop to unload ties and cinders and ballast, and do all sorts of company service which is never performed by the crews of the through trains. This service so performed is for the benefit of all the traffic but is erroneously charged here, by all these wise railroad managers, as a distinct cost against the local trains. He claims another element of extra expense because

"in local business the cars are rarely loaded to their full capacity." He refers here to the less than car load loading, saying that "often they are loaded with two or three thousand pounds," and qualifies that by continuing: "I believe the statistics made a year or two ago indicate that the merchandise averaged 2½ tons to the car." He did not seem to notice the inconsistency which lay within the same sentence, where in one place he says the load would be two or three thousand, and the other part of the sentence, five thousand.

At page 3134 we are met with a new invention in railroad business and terms. Mr. Elliott tells us that there is an item of constant expense in connection with the local short haul business which he calls "readiness to serve." This would seem to leave an intimation that the road does not need to have this "readiness to serve" for the long haul business. But if that is so, why would this road build hundreds of miles of double track and many, many miles of high grade passing tracks along its road? Why does it devote to the service of its long haul trains hundred ton engines with a capacity for pulling 2200 tons as against the old engines devoted to the service of the branch lines and local trains with a capacity not half so great?

Mr. Baird (Record, Vol. 4, p. 1545) states that these same through trains constituting so much of this desirable alleged low cost long haul traffic and for which there seems to be no need for any "readiness to serve," in going over the mountain divisions must have two or three of the maximum capacity engines to carry them as against one such engine through the state of Minnesota.

Surely Mr. Elliott, in this connection, would not have us to believe that the enormous and expensive facilities and terminals which the Northern Pacific has in the Twin Cities, at Minnesota Transfer, at Duluth, and several other places, to say nothing of the enormously expensive and extensive Pacific Coast facilities are acquired for the sole purpose of being ready to serve the local short haul train. Nor is it likely that he would have us to believe that the outside agency offices

maintained in such cities as New York, St. Louis, Philadelphia, Paris and in Japan are a readiness to serve for the benefit of the local short haul traffic in Minnesota, and yet a full measure of these expenses are apportioned to the state of Minnesota, and then not being satisfied with apportioning expenses to the intrastate traffic in which it has no concern, or which is of no benefit to it whatever, he must, in order to substantiate his desire to win this law suit apply a multiple of three to seven times against the intrastate freight business. He says, among other things along this line (Record, p. 3135): "The local rates should be very much higher.....The railroad managers and owners themselves have lost track of that fact. .....They have let their local rates run down entirely too low, failing to realize that their readiness to serve is a great daily burden." But there is no testimony to show that the local or intrastate rates were ever reduced prior to the action here sought to be enjoined.

Mr. Baird says (Nor. Pac. p.1547): "The rate on lumber from the Pacific Coast to the Twin Cities is substantially 4½ mills per ton per mile." It will be shown later in our argument that this is lower than the average cost of carrying the traffic over the system. As against this, Nor. Pac. Exhibit 5, we find the rate on lumber within the state of Minnesota is given at 3.3 cents for ten miles, which equals 66 mills per ton mile. Taking this same lumber rate for 25 miles, stated in the exhibit at page 27 as 5.4 cents per hundred weight, the revenue is 41 mills per ton per mile. The rates set out in Exhibit 5 are part of the rates enjoined and the traffic is actually moving on higher rates. This example, it will be understood, is not an extreme; it is made on the same commodity mentioned above and surely the rates obtained, even under this schedule, ought to disclose a sufficient difference between the rate on the long haul and the short haul to cover the alleged extra cost for "readiness to serve" and any other reasons. This trite illustration, based on the record introduced by the railroads themselves, should certainly refute the next paragraph uttered by Mr. Elliott on page 3135, wherein he says:

"They probably have done that because the railroad business has expanded tremendously in the last 25 years, and this enormous volume of commerce moving back and forth across the United States has taxed the brains and energy and strength and financial ability of every one connected with the railroad, and the railroads have not differentiated to the extent that they should in studying their business."

We have no doubt that the brains of these railroad men have been taxed, but it is not with the problem here recited. What has really taxed the brains of these railroad men, and what has really brought them to their wit's ends is the question as to whence they will get the necessary profits to make up the enormous losses imposed upon them by the carrying of millions of tons of freight across the country in their long haul business. In this illustration of this "readiness to serve" problem Mr. Elliott (Nor. Pac. p. 3137) does not seem to be very familiar with the operating conditions on his road and the railroads generally. This large engine he speaks of will lay up in the round house about as many hours in the year waiting for these large trains as will the local engine in laying in the round house between runs over night. And, as heretofore suggested, while the large engine is available for use either day or night, the local engine is used in the day time only because it suits the convenience of the company itself in that it demands of this engine and its train crew that it shall perform certain company construction and maintenance work which cannot be performed at night. Here, too, we are still minus the factor for determining the vital question in this case as to wherein this argument shall apply to the intrastate business.

Mr. Elliott tells us (Nor. Pac. pp. 1333, 1334) in his testimony that his road is well equipped and economically managed, and the net results as shown in the annual reports would tend to bear out that statement. He says, in answer to a question:

"A. Well, I was considering our railroad in Minnesota as equipped thoroughly for Minnesota.

Q. Well, were you considering it equipped as it is at present in Minnesota?

A. Yes, sir.

Q. Well, of course, the equipment in Minnesota is the necessary equipment of a large transcontinental road?

A. Well, part of it is, of course." (Nor. Pac. p. 1348.)

Mr. Elliott, (Nor. Pac. pp. 3138-3141) still in his attempt to justify his reason for applying an extra cost of from three to seven times for the intrastate business as against the interstate business speaks of the use of the cars, and intimates that there is much loss of the use of the car in its movement and in the time that it lies idle in the local traffic. Of his extreme example (Nor. Pac. p. 3139) he says: "A certain shipment would only produce a movement of 22 miles per day for a car." He acknowledges that another example might produce 25.7 miles per day for a car, and another example of 23.8 miles per day for a car in a local train. Complainant's exhibit 93, Johnson, treating of the freight car mileage in the state of Minnesota for the year ending June 30, 1908, shows the average miles per car per day by classes for April, 1908, to be 21.7 miles, and for the month of October 27.1, which produces an average for the two months of 24.4 miles, and the annual report shows the average on the system to be less than 22. It would appear from this that the car movement within the state of Minnesota is well above the average of the car movement on the system and exceeds that of the average for all the railroads within the United States as shown by the report of the Interstate Commerce Commission Reports for 1906, p. 16, where it is shown that for the year 1906 the car movement averaged only 23 miles per day. Mr. Elliott certainly has no cause of complaint in this particular, and this showing will certainly not justify a multiple of two and a half as adopted by the Master in applying the extra cost on intrastate as against interstate traffic within the state of Minnesota.

Mr. Elliott attempts to point out examples (Nor. Pac. pp. 3140, 3141) and to demonstrate wherein his cars produced

greater income and are in more constant use for actual service in the long haul than in the short haul traffic, and this is one of the reasons why a greater cost should attach to the local short haul business. His examples are in every case extremes. It is well known that much L. C. L. merchandise freight is carried over the long haul distances as well as over the short haul distances. The small communities along his 1900 miles of road must all be supplied, and no one will contend that the merchandise which is purchased along his line always moves in carload lots, and there is no testimony introduced anywhere in the record which would tend to prove that the loading of merchandise cars in the long haul is any greater than the loading of merchandise cars in the short haul. Against his example of the pianos cited, (Nor. Pac. p. 3141), a car of pianos moving 100 miles within the state of Minnesota under the Western Classification No. 45, in effect during the period under consideration, names the rate on pianos, carload, first class at 30.62 cents per hundred pounds, under the rates established by the commission, as shown in exhibit A attached to the order. This would produce an income on such a car of $36.75 per 100 miles as against his example of $322.00 for over 1700 miles. At this point it is well to remember that Mr. Elliott very strenuously contends that there is added risk at every train terminal that the car makes, and this car to Walla Walla would pass through at least fifteen terminals enroute as against one in the state car. But his entire argument along this line must fall flat, in the light of the testimony wherein we are told by Mr. Johnson that the trend of traffic in Minnesota is to the eastward and will exceed the traffic westward 25 per cent. Therefore, this car of pianos, considered as moving westward in the state of Minnesota, would be in immediate demand for returning with a load of 70,000 pounds of wheat, and there would be less empty mileage or lost time; while his earnings, when risk and cost of operation are taken into consideration, would be at least 50 per cent more on the local than on this through car cited. But, a further refutation of his claim is plainly shown in the record itself, as introduced by the railroad, wherein in exhibit 93, John-

son, it is shown that the average car miles per day for all the freight cars of the Northern Pacific, used within the state of Minnesota, was 24.4 miles as against which, by reference to the first page of exhibit 93, Johnson, showing the entire freight car equipment of the railroad for its entire system to be 42,171 cars; and taking the car mileage made by the entire system, as shown in their annual report (Vol. 1), it is found that the average miles per car per day on the entire system is hardly 22 miles. Lacking testimony definitely on this particular point, it must be assumed, as is generally known, that with a railroad situated as the Northern Pacific is, they will probably have as many of their own cars in use on foreign lines as the cars of foreign lines in use on their system will be, and this is further borne out by the condition of "Hire of Equipment" account.

Mr. Elliott concludes (Nor. Pac. p. 3142) that by reason of the example cited, "the local equipment, repairs per ton of freight are far above the equipment repairs per ton of freight on the through business and must from the example I have given be probably four or five or six times as great." Exhibit, Elliott, 79, gives in detail the amount of expenditures assigned to the lines in Minnesota and shows the cost for repairs, renewals and depreciation of freight train cars to have been for the year in question $839,738.21. The annual report shows for these same items, charges for the entire line $3,938,703.32, from which it will be found that the cost per car mile, for repairs, renewal and depreciation on the system was 1.16 cents, in the state 1.12 cents, and for the system exclusive of the state 1.17 cents. If, with this knowledge well settled in his own mind, there should be so much more expense charged to the state of Minnesota by reason of the examples given, then why was that not expressed in exhibit 79 when the apportionment was made to the state? In this same connection it will be found that the ratio of car miles in the state of Minnesota to system was 22.1 per cent, while the expenditures set out by the railroad as properly apportioned to the state on their theory was 21.32 per cent of the entire expenditures on the system for these items. His contention (Nor. Pac. p. 3143)

that " the wear and tear per ton of freight handled is greater for the local tonnage than for the through," can not be substantiated by the record any more than the difference in the ratio of the car miles or the cost for repairs to equipment. The record clearly shows, and the attention of the court has been called to it, that the average loading of the cars is practically the same within the state of Minnesota as for the system, and his chief contention is that the difference chargeable to the one traffic as against the other would be by reason of the difference in the loading of the cars. Therefore, since the record clearly proves that the loading per car is practically the same within the state as over the system, then his contention for any difference in cost must fail and can not be applied as between intrastate and interstate, in view of the fact that no showing is made in the record as to what, if any, difference there is in the car loading of the intrastate and interstate, but rather proves the intrastate loading to be much greater per car.

Mr. Elliott (Nor. Pac. p. 3143) makes a general resume of the reasons upon which he bases his opinion.

> "Why," as he says (Nor. Pac. p. 3144), he is "led very conclusively to the conclusion—which I have not arrived at since I came to Minnesota, because I had it in Missouri, and had it before these rate cases came up—all lead me to the conclusion that the so-called *local short haul intrastate business* costs anywhere from three to six or seven times as much as the so-called *long haul through interstate business.* I claim you can not reduce it to a mathematical certainty—I know I can't, and I don't believe any one can but taking your experience, watching your daily reports, going out over the road and seeing the difficulties that confront the superintendent and the agent and others engaged in the business, I have come to the conclusion that this so-called *local short haul business* is very much more expensive than the *through long haul.*"

As heretofore pointed out, all this conclusion is based on assumptions that certain conditions exist which, when the record is closely examined into, is shown in every case, at least to a

large extent, and in many cases, to be wholly without foundation. His first premise as to this extra cost of three to seven times is based on the difference between the long and short haul, and in this he uses an unfair and unconscionable basis in comparing the short haul intrastate with long haul interstate business *touching* Minnesota, as heretofore fully explained. In doing this, he makes no attempt to show the cost of the long haul business, and this must be known before a multiple can be applied to ascertain the alleged extra cost of the short haul, even on his assumptions. For the most part, however, his testimony, to which the attention of the court has been directed, is a comparison of local short haul business with through long haul business, having in mind at all times the entire haul over the system of interstate business originating, destinating, or passing through the state of Minnesota, and his comparisons throughout are as between the local and the through trains. In no case does he attempt to show the ratio of traffic of the intrastate as against interstate hauled on these local and through trains, and, therefore, *has no basis whatever for applying a ratio of extra cost to the intrastate business within Minnesota.* He speaks of the spasmodic business on the local and branch line part of his railroad, but the exhibits and testimony introduced by these railroad men do not bear him out in his statement that the business locally in Minnesota is any more spasmodic than the business on the system. It is clearly shown that the mileage made by the cars in service within the state of Minnesota is greater per day than on the system. The annual reports clearly demonstrate that there is but a slight difference between the loading of the cars on the system and within the state of Minnesota. They also show, by comparisons heretofore given in detail, that the ton miles per mile of road are 26 per cent greater in Minnesota than on the rest of the system, and the passenger miles per mile of road 12.2 per cent greater. Aside from the question of difference between long and short haul, these are the main points which Mr. Elliott attacks and by reason of which he claims this extra cost should be attached to the intrastate business, but regarding which he says in the very opening of his testimony when

being cross examined along these lines, in answer to the following:

> *"Q. You don't think you could satisfy yourself even approximately?*
>
> *A. I could make a guess, but after I have made a guess, why I wonder if I have guessed on the right basis."* (Nor. Pac., p. 1301.)

In the Missouri cases now pending before this Court, Mr. Elliott described many concrete practical ways in which he would divide operating expenses between intrastate and interstate traffic without the necessity of resorting to a wholesale guess for certain factors. Among his comments the Court will find that he would apportion terminal expenses "on a tonnage basis I think," equally according to volume; telegraph expenses could be apportioned on the basis of volume without being unfair to the through business; the expenses of "switchmen, flagmen, and watchmen would be more for the through business than for the local, because they are mostly at the large congested points. What the ratio would be I cannot tell"; switching expenses he would divide "on the number of cars. If you have ten through cars, and ten local cars, the switching would divide evenly;" the expenses of conductors, brakemen and train supplies "on a train mile basis"; the oiling of cars "on the car mile basis"; and engine service "on the train mile, practically." (Missouri Record, pp. 468-474.) Computations of this character would have some significance. The same methods should be applied to all items making up operating expenses, instead of an arbitrary blanket guess.

In this Northern Pacific record in the Minnesota cases the only other testimony given on this question of extra cost was delivered by Mr. William G. Johnson, the assistant comptroller of the road, and his testimony along these lines will be found in volume 8, at page 4107, recalled for further cross examination. Mr. Johnson was one of the original witnesses, as is developed in this record, who testified before the Minnesota Railroad and Warehouse Commission while the promul-

gation of the merchandise rates, effective Sept. 6, 1906, were under consideration and before the order was issued and made effective, in which case he made an affidavit touching, among other things, on the matter of alleged extra cost of doing the intrastate business over the cost of transacting all freight business in the state, which was, referring to cross examination on page 4111, in answer to the following:

"Q. Now, will you explain what you mean by that?

A. The statement that I make in that affidavit was based upon the investigation made at the time of the hearing before the commission as to the merchandise rates, as testified to by Mr. Gray.

Q. Well, I know, but I just wanted you to explain exactly what you meant by that language.

A. It was intended to convey the idea that the cost of what we call 'our through business,' as compared with the short haul business in the relation of 2½ for the short haul business as against 1 for the long haul business.

THE MASTER: I would ask, right here, whether in the use of the word 'through business' you used it in the same sense that Mr. Hillman used it?

WITNESS: No, sir. By through business there we meant the long haul business of the company.

THE MASTER: Well, what is the long haul business of the company, according to your definition?

WITNESS: Well, I would class in the long haul business such business as the lumber traffic from the Pacific Coast, business moving in large volume and for long distances.

Q. Now, Mr. Johnson, I suppose that it is only fair to say that you constantly had the entire system in mind when you speak of the traffic of the road.

A. Yes, sir.

Q. That system extends from Lake Superior to the Pacific Coast?

A. Yes, sir.

Q. So that when you speak of the through tonnage of the Northern Pacific road you mean business which extends for a considerable portion of the entire system?

A. Yes, sir.

Q. And in that sense, all the business transacted in Minnesota is local business and short haul business?

A. No, sir.

Q. That is, I mean all of the intrastate business.

A. Practically all of it, yes sir.

Q. So that, when you made the statement which you did, as you say, in the affidavit, that the Minnesota intrastate business costs per ton mile 2½ times the through business upon the Northern Pacific road—

A. Yes, sir; at least 2½.

Q. At least 2½ times?

A. Yes, sir; that was my opinion at the time I made the affidavit.

Q. You had in mind this Minnesota business as a whole as one class; that is, Minnesota intrastate business as a whole as one class?

A. Yes, sir.

Q. And the through business as to the system, such as the lumber freight from the coast to the Twin Cities as the other class?

A. Yes, sir; the long haul business as we term it.

Q. The long haul interstate business; and your judgment was that that Minnesota business cost not to exceed 2½ times—

MR. BUTLER (interrupting): At least 2½ times he stated, Mr. O'Brien.

Q. At least 2½ times the through business?

A. Yes, sir; at least 2½ times."

Continuing on page 4114, he says:

"A. There is, of course, interstate business in Minnesota that is hauled under the same conditions as the state business.

Q. Now, there is also a large amount of business in Minnesota which is hauled over an entire division which is intrastate business?

A. Yes, sir; there is."

Mr. Johnson, like Mr. Elliott, does not give detailed reasons for his estimate of extra cost, but clearly shows that he, like Mr. Elliott, uses as his principal basis for estimating extra

cost on the intrastate business the relationship of the local train to the through train, and of the short haul local business to the long haul through business touching Minnesota and over the whole line. He explains clearly, in answer to questions put to him on the cross examination and by the Master, that what he had definitely in mind in making his comparison was to consider the intrastate business in Minnesota as all short haul local business and, on the other hand, the interstate business as being all long haul through business; when reduced to figures, his comparison would be those shown in Exhibit 80 as 104 miles of local haul to 485 miles of long haul. We desire, at this point, to call the attention of the court to the fact that the average haul on the system, as shown by the annual report (p. 93) introduced and made a part of this record, is *325.59 miles*. Exhibit 80 does not show the ton miles which will produce the average for the long haul claimed by him of 485.3 miles on interstate business touching Minnesota. At various points in the testimony, Mr. Elliott ingeniously attaches to these figures, as representing the average long haul of Minnesota interstate business, the word "touching" which last word saves a gross misrepresentation on their part and seems to permit the use of this unfair figure for comparison. In order to understand what this means, it will be necessary to tell the court that it means whatever interstate business may be destined to, originate in, or pass through, Minnesota and calculated to its extreme point of origin or destination. Thereby is necessarily contemplated about 62 per cent of the average haul of this interstate traffic, which is entirely without the state of Minnesota and no conditions or explanation under this record, with expenses for performing the service on 185 miles directly allocated to Minnesota, can justify the use of this unfair average haul figure of freight touching Minnesota. That the use of the 485 miles in considering ratio is the same and means the same traffic, as the 185.86 miles (which is the average haul interstate within Minnesota) is clearly shown in question and answer appearing in the testimony of Mr. Elliott, in the Northern Pacific Record, page 3125. It is clear that the railroad companies have gone far beyond their usual cus-

tom, and outside of their ordinary records, as kept in their accounting offices, in order to be able to reach a figure which would lend itself to their plan of exaggeration and misrepresentation in applying elements of extra cost, by using throughout their testimony, where this matter is mentioned at all, these ratios and giving it as their principal reason for their conclusions. Throughout the exhibits and annual reports, with the exception only of this exhibit 80 and one or two others where this same idea is developed, no such figure will be found as coming from the records of the company. The average haul for the whole system on all their business was but 325.59 miles. That this is so is also further borne out by the note in this same exhibit 80, wherein it is stated that "the average total haul in all states of passengers, touching Minnesota, has not been computed." This was probably not computed in the case of the passenger business because the railroad officials did not consider it necessary to use larger figures.

Mr. Johnson, in his testimony, says that Mr. Gray, the comptroller of the road, testified fully before the Railroad and Warehouse Commission of Minnesota when the proposed merchandise schedule was under consideration, but Mr. Gray does not testify on this question at any point in the record in this case. It is on testimony of the nature described in the few preceding pages that the Master reaches his conclusion that it costs as much to carry one intrastate ton a mile as it did to carry 2½ interstate tons one mile within the state of Minnesota. The record is clear that on this subject in very many instances, as heretofore pointed out, and on many other of the essential points, facts which were available to the railroad companies were not submitted to substantiate their claims. Further than this, and the point in which grave harm has been done to the defendants in this case, is the assumption indulged in by the Master that intrastate traffic is synonymous with traffic carried on local trains, because throughout this record it is clearly proven that the comparisons made by these witnesses is not distinct as between intrastate and interstate business in Minnesota, but as between traffic hauled on local trains as compared to through trains, and nowhere is the ratio of

intrastate to interstate carried on local trains and the ratio between the two carried on through trains shown. But even this does not fully disclose the real harm done to the defendants in this case. Mr. Johnson, in his affidavit, specifically and definitely states, as he testifies on pages 4120 and 4121:

> "A. Yes, sir; *'hauling'*—I want to emphasize the word hauling; it does not speak of all operating expenses."

And further, on the same page:

> "Q. With that exception, the statement in your affidavit, in your opinion, is true?
>
> A. Yes, sir; that it costs *at least* 2½ times. For the haul."

Mr. Elliott (Nor. Pac., p. 3171) says:

> "Q. Now, Mr. Elliott, there is no difference in the cost of transporting per se interstate freight as compared with state freight?
>
> A. None.
>
> Q. Or vice versa?
>
> A. No, sir."

In the Missouri case now before this court Mr. Gray, the comptroller of the Northern Pacific Railway Company, was one of the principal witnesses and treated very fully on this subject. He says (Missouri Record, p. 622): "The comparison made by me is based on what is known as 'cost of conducting transportation,' special calculations being made for what is known as 'terminal expenses.'" Later on, in the same answer, he says: "The unit of cost used in stating the relative items has been the gross ton miles. It has been recognized by scientific men already, and the only practical unit of determining the relative cost of doing railroad business is the gross ton miles." He says (Missouri Record, p. 623): "The results for April and October show a cost per way freight train mile for movement expense,—what Mr. Stickeny calls the straight-a-way haul of 10.58 per cent in excess of through freight." At page 624: "The gross train load as ascertained by our examination of those two months, and by that I mean the gross ton

miles, on through freight was 1,187.6 tons and on local freight 801.2 tons." Later he testified:

> "A. Yes, sir. We do not start out in a rigid way and say certain trains shall be local, without regard to through freight, or *vice versa*. We operate the road as a whole, to the best interest of the whole.
>
> Q. The purport and significance of my question would all come down to this: that local and through freight trains are terms for designating trains; freight carried on local freight trains is not entirely freight beginning and ending in the state; and freight carried on through freight trains is not entirely interstate freight.
>
> A. As a general proposition, that is so.
>
> Q. So your testimony would not furnish a basis for calculating the percentage of state freight that was carried upon through freight trains, or the percentage of interstate freight that was handled by local freight trains?
>
> A. No, sir; my investigations did not cover that." (Missouri Record, 644.)

Yet in all this controversy one of the most vital problems is the determination of the relative cost of transacting the intrastate and interstate business.

It would appear from this that in the Northern Pacific case some of the figures with regard to the exact ratio of the loading of the local and through trains had been made up prior to the trial of this case and were available, but Mr. Elliott preferred to use conjectures and estimates, because he might thus be able to make the court believe that the local trains proportionately were very much lighter loaded than was disclosed by the actual figures developed by Mr. Gray. The figures for the months of April and October, worked out by Mr. Gray and shown in the Missouri record, produce a ratio of local freight train loading of about 68 per cent of the through train loading, but Mr. Elliott quoting his testimony in Volume 7, at page 3133 of this record, says:

> "On account of the fact that the local train is rarely used to its full efficiency and that the engine does not carry all that it can, it is probable that a local train will not pro-

duce a fifth of the ton miles in its operation in a day that a through train will do. In fact, I believe in some parts of Minnesota that some of the local trains would not produce a tenth of what the through freight trains would produce."

As against this wild guess, we have the testimony of Mr. Gray given in the Missouri case, at pages 623 and 624, quoted above, which conclusively demonstrates that the loading of the through trains was less than 50 per cent in excess of the local trains, and that the expense of haul was only 10.58 per cent greater for local than through. In view of these facts stated by Mr. Gray and developed from actual statistics, the conjectures contained in the last citation from Mr. Johnson's testimony, as well as many other guesses made by him and by Mr. Elliott, must necessarily lose much weight.

The testimony of Mr. Gray in the Missouri cases was given on October 24, 1906, and the months for which he produced the figures in the testimony there adduced were the same months used in a number of exhibits introduced in the testimony in the Northern Pacific case in May, 1909, but which were used for other purposes and showed other statistics than those used in the Missouri case. These figures were also used in the hearing before the Railroad and Warehouse Commission prior to the beginning of this trial, as is shown by the testimony of Mr. Johnson.

Treating the question of the apportionment of expenses, this same witness Gray says, in the Missouri case at page 665:

"Some experts whose names I do not recall — have stated that maintenance of plant—should be divided between local and through on the basis of volume of business. I presume they mean not volume of train, or volume of earnings, but volume of tons.

"I absolutely repudiate that. I say most men have not looked deeply into the question or they would never have laid down any such proposition as that; because talking of volume of business in that way, and applying it to maintenance of way and structures, takes no account of what was spoken of as 'dead weight.' "

Messrs. Elliott and Johnson agree with Mr. Gray regarding the use of gross ton miles, as is shown by their testimony quoted later in this brief, but they do not make the necessary or proper application, and the Master ignores it in making up his calculations and tables showing extra cost and apportionments.

From all the foregoing it is apparent that the Master brushed aside facts which appear in the record and chose in preference to adopt opinions, estimates and guesses of railroad witnesses in reaching his conclusions. The extracts from the record quoted clearly demonstrate that in the opinion of the witnesses who were qualified to testify in this matter the application of any multiple or any ratio of extra cost for the carrying of freight on through trains should apply only to the transportation expenses. The transportation expenses for the year ending June 30, 1908, as disclosed in complainant's exhibit Northern Pacific, Elliott 79, and as by them assigned to the freight traffic of the company, was 58.6 per cent of the entire expenses assigned to the freight within the state of Minnesota. So that even if the Master's conclusion as to the multiple which should be used had proper foundation, it should apply only to 58.6 per cent of the expenses allocated to the freight within the state of Minnesota and not to all the expenses. What the result of the proper application should be, and as nearly as could be found from the record, and the percentage of extra cost that should attach to the local traffic as against the through will be disclosed in another branch of the brief treating more particularly with the question of expenses, their division and apportionment between freight and passenger, and between intrastate and interstate. The attention of the court, because it is of vital importance, is at this point again called to the fact, which stands out clearly in the testimony, that the comparison of costs is made as between the carrying of traffic on local and through trains and without a single statement of the ratio in which the intrastate and interstate traffic are carried on local trains and the ratio in which the intrastate and interstate traffic are carried on through trains, and the then clear showing of the relationship between all; without this,

no conclusion of extra cost which should attach to the intrastate traffic can be exact, reliable, or even approximately correct.

Mr. Elliott, on cross examination (Northern Pacific, pp. 1313, 1314, 1315), says that he cannot state the relative cost of interstate and intrastate business; the mere fact that a shipment is state or interstate does not affect the cost; that it depends on the character and actual service; that the character of state and interstate business in a broad way are the same; that they have the same miscellaneous movement passing over the state lines as within the state; that some state business is transported at the lowest cost and some interstate business at the highest cost; that quite a large proportion of the Minnesota intrastate business is transported at the low rate; that under the same conditions so-called cost is the same for the second, third and fourth hundred miles as for the first hundred; and that (Northern Pacific, p. 1318) the long haul includes many train terminal charges.

The only separation made as to expenses is as between system and Minnesota, but no attempt is made to separate costs as between the long and short haul. The only factor along this line presented to the court is, therefore, the entire cost of handling all traffic within Minnesota and, according to the testimony, must be in proportion to the haul of interstate and intrastate traffic within Minnesota, and since the expense so apportioned cannot express the minimum cost of the long haul traffic touching Minnesota, it cannot be fair to apply the multiple found by the Master to the costs as disclosed for the state of Minnesota, which it is affirmatively shown by the testimony includes the most expensive terminals on the system.

One of the principal arguments for claiming lower cost for the long haul business is that cost of terminal handling is less per ton per mile because distributed over the longer haul. But this spread or distribution is not made in this case, and shows another inconsistency in the theories proposed by the railroads and adopted by the Master. The testimony clearly says that all expenditures of this nature within the state of Minne-

sota are charged in full and directly to the state, and not one word to show that any terminal expense has been spread over the longer hauls to conform to their theories. The discrepancy arising from this condition is of considerable moment. Examining the Northern Pacific record we find from the annual report that the expenses of the entire line for station and yard service for the year was $5,506,190.10, which was 13.81 per cent of all expenses. Nor. Pac. Exhibit, Eiliott, 79, shows these same expenses for the state of Minnesota to have been for the year $1,608,556.84, or 21.01 per cent of all expenses, showing that for these items there is charged against the traffic in the state of Minnesota 7.2 per cent excess over the average for the system, or $551,185.21, and is in fact an excess charge to Minnesota traffic over the average charge to traffic on the rest of the line of 73.63 per cent. This manner of accounting can never disclose the true cost of the long haul business, nor even approximately the relation between the cost of long and short haul traffic; the only conditions under which it can be proper are when the haul is equally divided between two states and terminal costs are practically the same in each, but in case of long haul business passing through one or more states, between states of origin and destination, the intermediate states, under the system applied, in fact but not in theory, by the roads and approved by the Master, escape all of such costs which ought to be distributed or spread over the entire haul.

These facts must be taken into consideration and definite calculations made before it is possible to determine cost of long haul business, and this cost must be found before it can be fair to apply any multiple or ratio to determine the cost of short haul traffic. To apply a[illegible]bitrary multiple to the average cost, or to costs within one state, under such conditions, is not only manifestly improper, but unfair in the extreme.

It is for these various reasons, therefore, improper to use the ratio of long to short haul; and without a frank and full disclosure of the true cost of the long haul and fair distribution of terminal costs over the entire haul, the only comparison

left applicable to the problem, is under the circumstances, the ratio of the average intrastate haul to the average interstate haul within the state.

We shall not, as heretofore said, burden the court with other claims of improper charges to expenses for the state of Minnesota which a complete analysis would, in our opinion, disclose, because for the most part the testimony is not sufficiently clear to substantiate and make definite such claims. But there is one item of considerable expense improperly included in Minnesota costs, clearly disclosed by the testimony, regarding which there is no doubt, and as to which overcharge by the Master's calculation, like in the preceding example, the intrastate business is made to bear two and one-half times its share in ratio of ton-miles.

The record clearly shows that practically all the coal used by the railroads in Minnesota and North Dakota comes from the east, and necessarily every pound of eastern coal used by them in the states of North Dakota and South Dakota is carried clear across the state of Minnesota, and the expense of such carriage, which is shown by the record to be no inconsiderable amount, is included in Minnesota, not a penny of it being shown to have been transferred to where it properly belongs. How much traffic of this nature for maintenance or additions and betterments in other states passed across the state of Minnesota, we are not informed because the record is silent, but these matters should be definitely known and fully explained before acts of the legislature are declared unconstitutional.

The testimony regarding the alleged extra cost for passenger business intrastate in Minnesota has even less foundation than the testimony regarding the freight business, and no exhibits are introduced or any valid reasons given to substantiate the claims for extra cost. It is too well and too generally known to need much argument on our part to demonstrate to the court that ordinarily the palatial, roomy and luxurious trains placed at the disposal of the through and interstate passengers is not usually found on the branch lines

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of these or any other of the railroad companies, and because of longer distances between stops they are not generally available to all the intrastate passengers even on the main line.

This is very fully argued in the Missouri case, as well as by other counsel in these cases, and it, therefore, needs no reiteration. But we cannot refrain from showing in a general way, in a few words, how preposterous is the claim that the carrying of passengers on local trains is more expensive than on through trains. It needs but to make a comparison in part to utterly refute the claim. The average through train on these as well as other transcontinental lines, is composed principally of the highest grade and heaviest equipment of the road, finest coaches, pullmans, with carrying capacity of less than half the capacity of an ordinary day coach such as is used on local trains, and in addition there are usually carried on these through trains dining cars and observatory or lounging cars earning no direct revenue for transportation; so that the equipment in weight per passenger mile will be from two to five times the equipment weight devoted to the use of passengers on local trains carrying generally to their limit of capacity. It costs more to keep up the equipment, to advertise, and in every way to look after the passengers, who enjoy these and other luxuries, but who are not called upon to pay as much as the intrastate passenger riding for the most part in stuffy, crowded, and nearly obsolete coaches, as will be seen by examining exhibit No. 3M, Hillman, table 10, which compares receipts per passenger per mile, expressed in cents, Minnesota intrastate with interstate for the years 1901 to 1908:

Year..	1901	1902	1903	1904	1905	1906	1907	1908
Inter..	2.0752	2.0585	2.0131	2.0114	2.027	1.9487	1.9811	1.9281
Intra..	2.2994	2.3065	2.3493	2.3805	2.4345	2.4061	2.1972	1.9300

The testimony of the other roads is generally along the same lines, contains the same inconsistencies, and contradictions, disagreeing only in degree. In the case of the Great Northern the comparison of haul is even more unfair than the Northern Pacific; the figures used being intrastate average haul 113.3

miles to 557.6 miles for interstate touching Minnesota, whereas the average haul of the interstate business in Minnesota was only 152 miles. (Grt. Nor. Exhibit, Ward 53.) The foregoing arguments will apply generally, although not in exact detail, to all the testimony adduced. The testimony of Mr. Hill is, if anything, more general than that of Mr. Elliott. The Great Northern does not produce any other witness, employees of their own, to testify along this important branch of the case; they bring in Mr. Ward, Mr. Doddridge, and Mr. McPherson, but their testimony is not substantiated by any exhibits or proof that can persuade or convince a fair and inquiring mind. Mr. Ward did not prepare the exhibits he introduced, and did not even know by whom they were prepared. Messrs. Doddridge and McPherson knew nothing of the local conditions, and their entire testimony was based on opinion, alleged observation, and assumption that conditions were about the same as in Missouri. We have every confidence that such testimony cannot be accepted as solid proof, impressed, as it is, with many fallacies and exaggerations.

A careful consideration of the foregoing facts can lead to but one conclusion and that is—the Master erred in fixing the multiples used as expressing the extra cost of conducting the intrastate business in Minnesota, and the judge erred in adopting the Master's findings; an impartial consideration of all the testimony, a consideration of the many contradictions, and inconsistencies, together with the acknowledged lack of evidence on many of the essential points could not possibly have led to the conclusions reached. The testimony of the railroads' witnesses will not permit of that application, nor even after the true ratio is found can it be applied to all expenses.

Certainly it is clearly shown that the Master utterly failed to take into consideration many of the essential facts pointed out to the Court, which must of necessity materially modify the multiple by him found; it clearly develops the fact that aside from the comparison of the haul, no definite figures were used, that these latter are unfair, unusual and out of all proper proportion, but that, taking all the evidence as a whole, it will

readily be seen that the ratio of the haul together with the testimony of Mr. Johnson is the only important evidence at the basis for the Master's finding that it "costs at least 2½ times as much per ton per mile to do the intrastate freight business." Assuming, then, that this is the correct basis, and applying the ratio by using the proper comparisons of hauls, we find the ratios to be as follows:

	Intra	Inter	Ratio
Northern Pacific—			
Average haul	104.52	185.86	1.78
Great Northern, excluding Mesabi Division—			
Average haul	116.9	181.00	1.55

Applying these ratios, then, to that part of the expenses which are all that could be affected in accordance with the testimony of Mr. Johnson, Mr. Gray, Mr. Elliott and others heretofore referred to, i. e., the transportation expenses, we find a ratio, which, while not mathematically exact, expresses more nearly the fair and rational per cent of extra cost of conducting the intrastate freight business than any figures used by the Master which, as is clearly shown, rests solely on opinion evidence and conjecture and rejects that part of the evidence, particularly that of Mr. Johnson's, which would have led him to a fairer and more accurate conclusion.

This same class of testimony was produced in the Missouri cases, now before this Court, by Messrs. Elliott, Gray, Doddridge, McPherson, and many others, but the learned Judge in that case did not accept it at par and apply the ratios of extra cost, as set out by the witnesses, to all the expenses, but concluded that the extra cost as disclosed by the testimony was "at least 50 per cent more" notwithstanding that there, as in these cases, the witnesses guessed the extra cost to be from three to seven times more.

That the rate of extra cost should not be applied to all expenses, is well recognized by several witnesses in these cases, in the Missouri cases and by railroad men generally. It is not a new or novel theory and should have been recognized and given its due weight by the Master. In the case of *Northern*

Pacific Railroad Company v. Keyes, et al., 91 Fed. 47, the Court says:

> "The operating expenses of a railroad consist of two principal items: (1) Cost of maintenance of plant; (2) Cost of conducting transportation. The former item is constant, and can justly be divided between the different kinds of traffic in proportion to their volume. As to the second item, however, such a division cannot properly be made; for it is agreed, by all who have had occasion to consider the subject, railroad commissioners as well as railroad officials, that the cost of conducting transportation is, relative to income, much higher for local business than for the general business of a road."

In this connection, we beg to again call the attention of the Court to the fact that the Master's finding in this respect, as well as in others, is based entirely on opinion evidence; that the railroad witnesses did not, as they could have done, produce facts or statistics to substantiate their estimates; and that in this the railroads have utterly failed to accept the burden of proof cast upon them as is uniformly expected of them by this Court, clearly set out in all the cases cited and subjects them to the criticisms contained in Mr. Justice Brewer's decision in *Chicago, Grand Trunk Railroad Company v. Wellman*, 143 U. S., 339, 345, 346, as to the weight which should be given to expert or opinion evidence in such cases.

Statistics to show the relationship of intrastate and interstate traffic on local and through trains were available to the railroads and should have been produced; some such tables were developed in the Missouri case, and witnesses in these cases acknowledge that it had been done in part and that statistics were available but not worked up because they claimed it would require too much time and expense. There can be no question that if the data and the facts would establish their extravagant claims, they would have spared neither time nor expense to develop them.

The Court has been frequently cited to the testimony of the witnesses in these cases where reference is at numerous points made to comparisons between long and short haul and the im-

portance of the use of the extreme figures cited; in every case the comparison is as between the average haul of Minnesota intrastate business with the interstate touching Minnesota to its extreme and final destination or place of origin whether within or without the State of Minnesota. Mr. Johnson says at p. 2219 that the longest haul in Minnesota is not over 310 miles. The annual report of the Northern Pacific shows the average haul on the system to be 325 miles; on the Great Northern, 267 miles; yet, in spite of this and the positive testimony of the witnesses heretofore cited, that comparison was in all cases the Minnesota intra with the long haul on entire system. The Master finds at page 256 that the ratios are expressed as follows:

	Intra Haul	Inter Haul
Northern Pacific	104.52 miles	485.3 miles
Great Northern	113.3 miles	411.8 miles

and quotes the ton miles produced in this traffic:

> "The manner of finding average haul is to divide the ton miles by the number of tons," see Nor. Pac. Exhibit, Elliott 80, Great Nor. Exhibit, Ward 53, or "the tons multiplied by average haul when known, should produce the ton miles."

Applying this test to the Master's finding, it develops that to arrive at the average haul adopted by the Master would produce, in the case of the Northern Pacific, 2,508,566,171 ton miles and of the Great Northern, 5,288,455,962 ton miles, while, by the Exhibits named and the Master's report at page 256, it is shown that the interstate ton miles are, for the two companies, respectively 960,709,494 and 1,952,426,967, thus resulting in the adoption by the Master of figures for basic ratio which are over 2½ times the actual within Minnesota and further proves our contention that when analyzed, stripped of persiflage and laid bare, it leads infallibly to the conclusion that this is the real basis for the Master's adoption of the multiple of 2½ times for cost of carrying intrastate freight, comparing the ton miles produced by the average haul in each case, because if fair to distort the miles of haul it be-

comes necessary to use the same basis in the ton miles produced by the averages adopted, then the ratio for the division of expense becomes in the Northern Pacific 11.52 per cent for intrastate and 88.48 for interstate, and in the Great Northern 7.47 per cent for intrastate and 92.53 per cent for interstate.

Now, applying the Master's theory, but using the figures which do actually express the ratio of haul in Minnesota, which is the only business to be considered in this case (as actually disclosed in the railroad witnesses' exhibits), and the conduct of which, exclusive of any haul or other influence, is by complainants claimed to have incurred the expenses set out in the exhibits and is likewise all that is to be considered, we find that the ratio of haul is as above set out, on the Northern Pacific, intrastate 104.52 miles, interstate 185.86 miles, ratio 1.78, and on the Great Northern intrastate 116.9 miles, interstate 181.00 miles, ratio 1.55. The application to the proper expenses and the resultant effect will be fully shown in the section of the brief to follow, inasmuch as it is necessary to treat with the improper division of expenses as between passenger and freight traffic before a final conclusion can be correctly shown.

The Master erred in failing to take notice of the facts above set out, and particularly in making application of incorrect and unfair ratios to his theory, and since this becomes the very foundation of his structure in finding the rates unremunerative and confiscatory, his whole fabric, because erroneous, must of necessity fall and his findings be reversed.

Proof that intrastate gross revenues are correctly stated and that interstate revenues are properly apportioned to the state of Minnesota is deficient.

The Northern Pacific and the Great Northern present in these cases a number of exhibits purporting to show revenues earned in Minnesota for the years ending June 30, 1907, and June 30, 1908; some exhibits purporting to make a readjustment of intrastate revenues theretofore reported to the Railroad and Warehouse Commission in sworn annual reports by

deducting from 37 per cent to 58 per cent from the amounts previously stated under oath, and claim that these deductions are by reason of error in the interpretation of what was intrastate traffic as distinguished from a certain class of interstate traffic. But assuming that the error was made as a matter of fact, the amount is not clearly proven, and there is no proof in the record that the deduction is reasonable or correct. When a witness under oath testifies to certain matters and later claims to have made an error in giving said testimony, it is incumbent upon him to fully explain the error, and when to the advantage of the witness' case, must clearly show that the alleged correction is reasonable and right, else his testimony should fail entirely; to merely say that the former figures sworn to were incorrect and present new figures to his own advantage without clear proof is not enough, and the Master erred in adopting said figures and in rejecting or ignoring herein as elsewhere the testimony of the defendants, which was shown to have foundation in fact.

In Vol. 4, p. 1700, Johnson says:

> "We made an investigation and found what the percentage of error was in the classification of freight as between intrastate and interstate in that respect, and the figures herein given are the figures as near as we can possibly arrive at them at this time for the true intrastate business.
>
> Q. How did you arrive at that percentage of error?
>
> A. By an examination of every way-bill for two months.
>
> Q. What two months?
>
> A. October, 1905, and April, 1906.
>
> Q. Then you took what you had theretofore classified as intrastate and deducted from the total of that as shown by the records of that year the percentage of error?
>
> A. Yes, sir.
>
> Q. As determined in that way?
>
> A. Yes, sir."

Further on at page 1701:

"Q. What did you find to be the percentage of error in the intrastate business, as you calculated it, on those two months?

A. I don't believe I have the figures with me, but to the best of my recollection it was about 58 per cent.

Q. That is, that it was that much too large?

A. That much too large.

Q. Then this 1,446,616 tons is substantially 42 per cent of what under the method you had formerly used would be classed as intrastate business?

A. Yes, sir; approximately."

At page 1702:

"Q. And did you use the same percentage of error for the tons one mile as you did for the tons carried?

A. No, sir.

Q. What percentage of error did you use for the tons one mile?

A. I don't recall now. As I have heretofore stated, I did not bring that statement with me, or I could very readily answer your question."

At page 1703:

"Q. Then, having the actual tonnage on intrastate for those two months, how did you arrive at the result for the year on intrastate business?

A. By applying the percentages to the whole year's business."

At page 1704, in answer to a question:

"A. We used the percentage that was arrived at from an analysis of the business for October, 1905, and April, 1906, as respects the tons of freight carried one mile. We did not use the same percentage of error in connection with the tons one mile as we did with the tons carried."

There is nothing in the record in connection with this evidence, aside from complainant's exhibit No. 54, Johnson, showing the figures for tons and ton miles and percentages and making comparison with the system for the entire year, but no fig-

ures showing the manner of arriving at his conclusion that his former sworn statement to the Railroad and Warehouse Commission of Minnesota as to the intrastate business was subject to a reduction of 58 per cent. It would seem that so substantial a reduction would certainly entitle the defendants to a clear and full explanation. He says that he concluded that October, 1905, and April, 1906, were fair months on which to base his conclusions. It is probable that these two months were used, and he intimates as much at other parts of the testimony, because they were the same months which had been fully worked up and analyzed for use by himself and Mr. Gray in the hearings before the Railroad and Warehouse Commission prior to making effective the schedules of September, 1906. But it needs more proof than his mere *ipse dixit* that these months are fair and that the percentages for deduction by him alleged to have been arrived at are proper. It is necessary to show that the relationship between the tons and tons one mile and the revenue are about the same for the period under consideration as they were for the months analyzed. Without testimony to the effect that this was actually so, his application of percentages for those months to the year 1908 cannot be concluded as being correct or fair.

In the Great Northern case Mr. Parker, in his Exhibit No. 18, shows the tons one mile and revenue for the months of October, 1907, and April, 1908, and therein must be found a clear demonstration that these months are not typical, or average months from which could be deduced any percentages that could be considered absolutely fair and reliable to apply to a year's business. The month of October, 1907, shows nearly seven hundred million tons one mile to a revenue of over five million dollars, while the month of April shows less than three hundred million tons one mile and a revenue of two and one-half million dollars. The total of the two months, if multiplied by six would show a variation between the actual figures for the year ending June 30, 1908, shown on this statement, and the result produced by the application of the multiple six to bring the two months to a full year of nearly a billion tons one mile and about six million dollars in the revenue.

Surely, such figures cannot produce a proper basis for making any calculation as to the enormous reductions claimed by the railroads to be necessary in order to disclose the actual amount of intrastate business within the State of Minnesota for the year 1908. Aside from this it is not shown by Mr. Johnson, or even claimed that the business relatively was running the same in the years 1905 and 1906 as in the year 1908; on the contrary, it is well known that the latter part of 1907 and the early part of 1908, by reason of the panic, necessarily made any calculations on that period unreliable and uncertain.

In the Great Northern case readjustments were made of about the same nature, but in that case we are not favored with a demonstration or exhibits pretending to show the manner of arriving at said readjustment, the percentages applied, or any testimony which can satisfactorily explain or demonstrate that the readjustment is fair to the State of Minnesota. In the Great Northern case at page 988 of the testimony, Mr. Martin, Comptroller of the Great Northern Railroad, is asked the following question:

> "Q. And the method of apportioning the earnings to the State, is that prescribed by the forms furnished by the Railroad and Warehouse Commission?
>
> A. Yes, sir.
>
> Q. Giving to the State credit for everything that was earned on traffic moving wholly within the State, and dividing the interstate business on the basis of mileage *pro rate?*
>
> A. Yes, sir."

In this there is the same lack of definiteness as to the apportionments, and the Master is not enlightened, nor can any one from the testimony or exhibits introduced state with certainty what the revenues actually were in any of these cases. When exhibits are introduced purporting to show the gross revenue, which necessarily becomes the prime factor for arriving at and determining the actual net return to the company, and such statements are made, as is clearly shown, on estimates, corrections of errors, applications of unexplained ratios and percentages of deductions and changes, it will certainly not be

claimed that it is testimony of the nature uniformly required by this court to be certain, clear and without doubt, in order that it may be used as the foundation for declaring State statutes unconstitutional and the rates confiscatory.

As appears in the testimony, these railroads were able to produce figures for the year ending June 30, 1909 (see Parker Exhibits 61 and 62) during which time it is claimed that the statistics of the business were kept on both the old and the new basis for disclosing the actual intrastate freight business as separate from the former so-called local interstate. If it was necessary to make use of percentages for arriving at a deduction for the year 1908, why then were not the percentages developed from the actual experience as shown in the above exhibits used rather than estimates based on the short period and unfair months, or better still, why did the railroads not make the separation actually, which could readily have been done if they had desired to do so, inasmuch as the records were available, and it is clearly shown that when by them desired to make exposition of any facts to their own advantage, the compilations are readily and promptly produced?

The railroads in making their final demonstrations used the year 1908, while the defendants were using the year 1907. The complainant strenuously maintained in various connections that the figures were not more definitely given because it was impossible to get them without too much loss of time and expense. If there was good reason for using the year 1908 while the defendants were using the year 1907, why could they not just as well have used the year 1909 before closing their cases both as to the revenues and expenses and made a demonstration of the actual conditions which they claimed they could do, rather than rest their case on estimates and exhibits which are full of errors, corrections and inconsistencies? Testimony of this nature does not fall within the demands of this court in cases of such grave importance as is clearly shown in the case of *San Diego Land & Town Co. v. National City*, 174 U. S., 739, 754, where it is held:

> "Judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use."

Again in *Chicago, Milwaukee & St. Paul Ry. v. Tompkins,* 176 U. S., 167, 173:

> "In approaching the consideration of a case of this kind (a rate case) we start with the presumption that the act of the legislature is valid, and upon any company seeking to challenge its validity rests the burden of proving that it infringes the constitutional guarantee of protection to property. The case must be a clear one in behalf of the railroad company or the legislation of the state must be upheld."

And quoting from Mr. Justice Brewer in *Chicago & Grand Trunk R. Co. v. Wellman,* (143 U. S., 339, 346):

> "Our suggestion is only to indicate how easily courts may be misled into grievous wrong to the public, and how careful they should be to not declare legislative acts unconstitutional upon agreed and general statements, and without the fullest disclosure of all material facts."

The testimony generally, only a small part of which is referred to above, must leave the court in grave doubt with regard to the starting point for making final deductions.

The methods used to divide expenses between freight and passenger and their apportionment between interstate and intrastate traffic become of vital importance in determining net revenues when complainants use such result upon which to predicate their claim of confiscation.

The Master, in speaking of the division and assignment of expenses between freight and passenger traffic, Nor. Pac. 253, says:

". . . This division and assignment has been accepted by the complainants and they have offered much testimony in support thereof in these two cases."

Here, as elsewhere, the Master ignored the testimony of defendants.

At the conclusion of Sec. XVI of his findings the Master says:

> "In the Minneapolis and St. Louis case a division of cost between freight and passenger business was made by the company upon a combination of train, car and engine mileage, with results so close to those produced by the Hillman method that they were accepted by the defendants."

In the case of the Great Northern and Northern Pacific the Master severely criticized the Hillman method but has no criticism for the M. & St. L., where the result practically agrees with Hillman's, while if the same method had been applied as was adopted by the other two roads the difference would have been as great in proportion as in the other two cases.

Any question affecting the division of expenses necessarily strikes at the very foundation for determining the reasonableness of rates, and unless proper methods are used the result must be harmful to the freight or passenger and where only one class of rates is in controversy a slight difference in method may apportion too much to the one and too little to the other, thus lending itself easily to defeat what would otherwise prove to be proper legislation.

There is no intent here to intrude with theories or demonstrations not founded on the record, to refine the questions in detail or to defend the methods adopted by defendants; this last is left for defendants' counsel.

Practically all the states in the Mississippi valley are vitally interested in these cases and the proper division of expenses has, to date, been one of the most important elements in the contentions between the states and railroads in all the rate cases heretofore tried or now in the courts; we therefore feel

that we are fully justified and may be pardoned for devoting some time to this most vital point, particularly as to those parts wherein lies the greatest harm. In Arkansas, Oklahoma, Texas, Alabama, North and South Dakota, as well as in Missouri, this question in the trial of the cases called forth volumes of testimony on both sides and vied for rank in importance with the question of extra cost for conducting intrastate traffic. The same questions are being tried out in the federal court in the Nebraska cases and elsewhere and the problem has vexed the courts for more than a generation without seeming to approach a solution, until in the past year or two. That scientific cost accounting for the railroads is possible and practicable, has been amply proven in that it has been generally adopted in many great enterprises with problems as intricate and complicated as those alleged to confront the railroads, and they ought not to be permitted to avoid the burden of proof which the law imposes on them by merely telling the courts that they do not keep their accounts in such a way as to disclose the facts necessary for a solution of the problem in hand, that they do not do so because it would take too much time and be expensive, or for any of the other frivolous excuses offered to the courts in lieu of facts, and until they at least make honest effort in this direction no rate case should ever be resolved in their favor; this is in perfect accord with the long line of decisions handed down by this court.

In the cases here under consideration, the same difficulties are met and the same stereotyped excuses and evasions are offered by the railroad witnesses as elsewhere, always with the bold front which seems to repel as unwarranted arrogance the idea that their *ipse dixit* could by any chance be doubted and resenting as preposterous the thought that anyone other than a railroad man of long experience could by any possible chance be qualified to give any creditable testimony or have any theories worthy of consideration; in all this the Master seems to fully concur. Can this be? If so, then our state railway, public service commissions and the Interstate Commerce Commission are an expensive and useless appendix in

the anatomy of our government and should forthwith be subjected to the surgeon's knife.

But the diction of the Master's findings leads unerringly to the conclusion that it is his firm conviction that, excepting the complainant's testimony, the record contains no evidence worthy of notice.

Freight and Passenger Expenses Erroneously Apportioned, as in These Cases, Serves to Exaggerate Intrastate Expenses.

The larger portion of the total expenses that can be allocated to passenger traffic instead of to freight, the larger will be the total state expenses. This follows from the following facts: In the Northern Pacific case, for example, only 15 per cent of the freight business is intrastate, while 48 per cent of the passenger business is intrastate. (Master's Report, Table "Statement No. 3.") Suppose $10,000,000, which should have been charged to freight, is in fact charged to passenger business, then 48 per cent of this, or $4,800,000 will be charged to the state, while if that $10,000,000 had been charged to freight traffic, only 15 per cent or $1,500,000 (instead of $4,800,000) would have been charged to the state.

While the methods used for apportioning nearly all the common expenses between freight and passenger business are subject to criticism we shall not here burden the court with detailed argument on all the items, but confine it only to that part which discloses the most flagrant departure from reasonable and just methods; this is found in the expenses for *Maintenance of Ways and Structures.*

The result of the division in the Northern Pacific case is set out in Exhibit 79, Elliott, and Mr. Johnson testifies as to the methods used in Vol. 7 at pages 3248-9, introducing the formula at pages 3250-1. At 3249 he says divisions are made on the same basis as the Great Northern. In the latter case Exhibit 47, Martin, sets out the divisions and Mr. Martin, at page 984, volume 3, says that except on a few small items the *Maintenance of Ways and Structures* expenses are divided

between passenger and freight on the ratio of the revenue engine miles.

It requires no specially keen intellect or a generation of experience in railroad management to learn that rails, ties, bridges and facilities generally, will be worn by the traffic passing over them and that such wear, and in consequence the expense of up-keep, should be apportioned between the freight and passenger business in the ratio of the volume of traffic. There is no contention as to this, the complainant's testimony generally concedes it and it is not controverted. The trouble lies in finding the unit which, when applied, will express the proper relationship.

It will require a vivid imagination to justify the use of the revenue engine mile and no attempt is made by complainants to do so, except to say that it has been their custom and was their interpretation of the former demand of the Interstate Commerce Commission, but by that Commission found useless and incorrect and for those reasons abandoned. There can be no valid excuse for adopting arbitrary methods which fall so far short of being reasonable as to be positively absurd even to the casual observer, especially when the statistics are available, which will determine with fair accuracy the proper relation. Mr. Johnson, in these cases, Mr. Gray, in the Missouri cases especially, and Mr. Elliott and other witnesses, base many of their estimates and conclusions on the gross ton miles: Mr. Elliott, at pp. 3142-3, Vol. 7, says:

> "The wear and tear of your permanent way should be considered. One without thinking would say that the wear and tear of your permanent way—that is, your track and bridges and buildings—would be no greater per ton of local freight than per ton of through freight; but that is not true. Your track is worn out by the blow given to it by the wheels and by the friction of the wheels passing over the rail. The roll load drives the rail into the tie, drives the tie into the ballast and helps to wear out the tie, helps to move the tie in the ballast and to that extent creates labor to repair the track, it hammers the joints of the rail and makes a low joint and it rubs a little metal off the rail every time it moves. Now, a freight car has eight

wheels that strike that blow every time it goes over the rail; the through freight will have from 18 to 20 tons on the eight wheels, so that the wheel blow and the consequent damage to the track is distributed among 18 or 20 tons; the local car will have from 3 to 10 tons and the wheel blow and friction is distributed among 3 to 10 tons of local freight. The wear and tear per ton of freight handled is greater for the local tonnage than for the through. Now it may be said that the heavier weight in the through car should be taken into account—and it should be—but it is not enough to offset the fact that the chief damage to the track is done by the general rolling weight of the car; that is, there is considerable damage to the track done. If you run empty cars and nothing else, it would not be quite so great as if they were very heavily loaded."

Some of the testimony of Messrs. Gray and Johnson along these lines has been heretofore quoted and is unequivocal, leading positively to the conclusion that it is their opinion, as well as the opinion of Mr. Elliott and other witnesses in the cases, that the gross tonnage or volume of traffic carried over the road is the factor which must necessarily determine the proportion of expenses to be charged as against the passenger and freight traffic respectively. The testimony of Mr. Gray, on this point, is so clear and unequivocal that we presume on the patience of the court to quote it a second time. In speaking of the proper manner for division of expenses, Mr. Gray, in Missouri record, p. 665, says:

"Some experts whose names I do not recall * * * have stated that maintenance of plant * * * should be divided between local and through on the basis of volume of business. I presume they mean not volume of train, or volume of earnings, but volume of tons.

"I absolutely repudiate that. I say those men have not looked deeply into the question or they would never have laid down any such proposition as that; because talking of volume of business, in that way, applying it to maintenance of way and structures, takes no account of what was spoken of as 'dead weight.'"

But, when making division on maintenance of way and structures expenses the theory and reasoning are abandoned,

and instead thereof the ratio of engine miles is applied; this, because of the very wide difference in volume of traffic carried behind the freight and passenger engines, cannot possibly express the proper ratio of expenses for maintenance of way and structures incurred in conducting the freight and passenger traffic respectively.

A reference to the annual reports of the Northern Pacific and Great Northern railroads, made part of the exhibits in this case and which will be found in volume 1, discloses various statistics for the system and also for the traffic in the state of Minnesota for the year ending June 30, 1908. It will be found in the case of Northern Pacific that in the freight traffic in the state of Minnesota the average number of cars hauled behind a locomotive was 31.32 as against 5.88 cars in the passenger traffic. In the case of Great Northern the average number of cars behind each locomotive in the freight traffic was 37.68 as against 5.38 in the passenger traffic.

Mr. Johnson tells us that his road has adopted as an arbitrary average tare weight for all the freight equipment of his road 17 tons. The average tare for passenger train equipment is not given, but making a liberal allowance and taking the average weight of passenger train cars of all kinds at 37½ tons, allowing 150 pounds as the average for each passenger and 5 tons as the average loading of baggage, mail and express cars, we are enabled to determine, with approximate certainty, the gross ton miles for each of the roads, and it would appear that the gross ton miles handled to each locomotive mile in the freight service for the Northern Pacific were 977 as against 231 in the passenger service. In the Great Northern the gross ton miles per locomotive mile in the freight service were 1,260 as against 211 in the passenger service. Tables showing these ratios and figures are appended some pages further on.

With such wide difference in the traffic, it certainly can not be contended that the engine mile could, by any possible chance, express the ratio of maintenance of way and structure expenses incurred in the conduct of the business. The Mas-

ter's attention was called to this discrepancy by the defendants' witnesses, and it should have challenged his attention and enabled him to determine for himself, from the statistics and figures which were available to him, that the testimony of the railroads in this particular respect was not entitled to credit.

In case No. 599, Vol. 1, page 257, the Master in his opinion gives part of his reasons for accepting the testimony of the railroads' witnesses and for rejecting that of the defendants. Criticising witness Hillman, he said among other things:

> "Another matter tending to discredit the Hillman method is the wide spread in operating per cent between state and interstate business of some of the companies and the low operating per cent as to state business on some lines as compared with that on others and as compared with the operating per cent generally found to exist on all lines of all business done in the country. Operating per cent is the per cent of gross revenue absorbed by cost of operation, and if we may take the statement of counsel in one of the briefs for defendants, (and it would seem to be a matter as to which the court might take judicial notice) such operating expense is about 60 per cent of gross revenue generally throughout the country. By the Hillman method percentages of operating expense to revenue after deducting estimated losses from the prescribed rates in the three cases are found to be as follows: Intrastate passenger, N. P. 58.89; G. N. 67; M. & St. L. 62.54. Interstate passenger, N. P. 51.69; G. N. 59.2; M. & St. L. 63.67. Intrastate freight, N. P. 55.21; G. N. 41.51; M. & St. L. 48.19. Interstate freight, N. P. 54.47; G. N. 60.58; M. & St. L. 85.03. In the St. Louis case, in the intrastate business, without deducting for estimated loss, the operating expense would have been only 41.9 per cent of intrastate revenue, and in the Great Northern case such operating expense would have been only 39.9 per cent of intrastate revenue. There seems to be no substantial reason for the difference here found to exist on the Northern Pacific when compared with the Great Northern line, and the marked and necessarily conceded difference in density of traffic over these lines and that over the Minneapolis & St. Louis line, the former greatly exceeding the latter would be expected to produce very different re-

sults than those shown by this table of comparisons. The wide disparities and unusual results from comparisons are not adequately explained, and they strongly suggest an improper method of division between the two classes of business."

It is no doubt true that the court will take judicial notice that the operating expense is about 60 per cent of the gross revenue throughout the country, but the court will also take judicial notice, if it does of the point named, that the percentages producing this average of about 60 per cent will range from 50 to over 100 with the various roads in the country, and the ratio of 60 per cent is not one to be arbitrarily adopted in determining as to whether or not, when comparing two roads in the same section of the country, figures presented are approximately correct. It must be borne in mind, and is frequently acknowledged by the witnesses, that there are wide differences in the operating conditions of the Great Northern, the Northern Pacific, and the Minneapolis & St. Louis roads.

A further reference to the Minnesota traffic and mileage statistics will disclose many of these variations, and a few of them are cited here as instances in order that the court may understand that there is good reason for showing differences in the final net income of the roads. The passenger train service revenue per mile of road is shown to be for the Northern Pacific $3,584.15 and for the Great Northern $2,095.70; per train mile for the Northern Pacific $1.69389 and for the Great Northern $1.41626. In the freight traffic the revenue per mile of road for the Northern Pacific is $9,611.83 and for the Great Northern $7,620.00; freight revenue per train mile $4.33833 for the Northern Pacific, and $4.6626 for the Great Northern. The average tonnage per train mile in the freight service was for the Northern Pacific 498.88 tons, and for the Great Northern 632.35 tons. These differences, when analyzed, will readily disclose why the ratio of operating expense to gross revenue can not be the same for the two roads.

It is clear that in criticising the ratios finally developed by Mr. Hillman the Master failed entirely to take into considera-

tion the fact that the per ton per mile revenue in the freight traffic was much greater for intrastate than interstate business, being in the case of Northern Pacific as 1.44 to 1, and in the Great Northern 2.03 to 1. When the revenue per ton per mile is equated, intrastate with interstate, these ratios of expense to gross earnings on the freight traffic would show on the Northern Pacific about 79 per cent and on the Great Northern about 83 per cent for intrastate, as against 54 per cent on the Northern Pacific and 60 per cent on the Great Northern for interstate freight traffic, and demonstrates clearly that in the calculations made by Mr. Hillman ample allowance has been made for extra cost of conducting intrastate traffic over interstate traffic.

The matters above set out are of the most vital importance, and unless full and adequate consideration is given to them and there is taken into consideration the difference in revenues and an equation is brought about before comparisons are made, it is impossible to arrive at a conclusion which would be even approximately correct. This is a fundamental truth recognized by this court; it was appropriately stated by Mr. Justice Brewer in *Ames v. Union Pacific R. Co.*, 64 Fed., 182, as follows:

> "Obviously, the cost of transportation would be the same whether the companies received the prices which they did in fact receive, or the reduced rates prescribed by the bill."

So that, if a calculation showing the per cent of operating expenses to be 40 per cent in case of intrastate as against 60 per cent in case of interstate traffic, consideration is given the fact that the ratio of rates producing the gross incomes were as two to one, then an equation of the rates producing the income would show that the operating expenses on the equated basis would be in case of intrastate 80 per cent as against 60 per cent of the interstate. Hence, the "wide disparities and unusual results from comparisons," suggested by the Master, disappear entirely when full consideration is given the factors necessary to be taken into account.

The record shows there is a duplication in the maintenance of equipment accounts of these carriers. It is now, and has been in the past, the custom of these companies to keep their equipment up to 100 per cent efficiency out of repairs and renewals under the general heading of operating expenses. In the year ending June 30, 1908, they added an item called "depreciation of equipment," in attempted compliance with orders of the interstate commerce commission. *There can be no valid objection to the setting aside of a sum each year which will serve to replace worn out equipment, under "depreciation," in addition to an allowance for repairs and renewals; but where a company is already making provision for that very purpose in its accounts, under repairs and renewals, then to add another allowance for the same purpose is clearly and unmistakably an unjust duplication.*

Under the head of "repairs and renewals" these companies kept their property up; an engine, needing a new wheel or rod, had that repair made to it, and charged to repairs and renewals, later when the engine became worn out, or was discarded for a larger type, the value of the original engine was charged to operating expenses under repairs and renewals. Beginning June 30, 1907, in addition to the foregoing charges an arbitrary percentage representing an average depreciation was also charged to operating expenses. This percentage was so computed that the depreciation fund would provide for replacement of worn out equipment at the end of its average life. Here there is a clear duplication. In order that there can be no question about our position in regard to this matter we will give somewhat extensive extracts from the record in support of our position. Taking the Northern Pacific as a representative line, we find the following applying to both right of way and equipment, in the testimony of its President, Mr. Elliott:

> "Now, the ties and the rails and the ballast on a railroad, of course, wear out, but in a well organized railroad the wear of your ties, rails and ballast is taken care of each year by the renewals of those items.
>
> Q. As an operating expense?

A. That is charged to operating expenses. There is a class of buildings, of course, that do depreciate; take wooden structures, water-tanks, etc. You might say that the new material in a wooden building twenty years old is not worth as much as it was when it was new. It is true you could not tear it down and sell it to somebody and get your money back, but, as a tool of commerce, it is just as good for us as it was when it was first put up, because it has been painted and repaired and patched up and kept in order. In the Yakima valley we have just the same station structures at some of our stations that we had when the road was put through there in 1886. The only trouble we have is that they are too small, we have got to throw some of them away because they are too small. They have not depreciated, as a tool for doing business, at all, in good order, they have been kept up. The same thing is true in the Yellowstone valley, we have the same structures there that we had twenty years ago. A good many here in Minnesota. Naturally, as we find the towns grow and we need a better structure, we in common with citizens generally are apt to put up a better type or put up a stone or brick structure, very often, where ten years ago we put up a wooden one, but the depreciation of those wooden structures is taken care of in the same way it is on ties and rail and ballast, by constant repairs and renewals, that go on every day and every week and every month, kept in good order. Take a wooden bridge; we very rarely renew a wooden bridge now. We put in a concrete structure or steel eye-beam or a concrete arch, or we put in a steel girder or truss. In that case, we charge to operating expenses the entire cost of rebuilding a structure of the kind that is replaced, and the excess we charge to our capital or income account, so we take up in our operating expenses the cost of reproducing the structure in kind which takes care of all of the possible depreciation and is put into the expenses of the road. Now, on equipment, it is very hard to say what is the depreciation of a modern piece of equipment. It is something, of course. But we aim (and I don't think we differ from others) to keep up our repairs, and all of our equipment, as vehicles of commerce, are just exactly as good for our purposes today as they were when we bought them, and some of them are better. Take a locomotive with us, we generally have to take a year to get it in just the condition we want after it comes from the locomotive builders. It has, so

to speak, got to get seasoned; it has got to get used to the water, it has got to get used to the coal, and we think they are better after we have had them a year or two than when we bought them, and we aim to renew them as frequently as is necessary to put in new fire boxes, new flues, and do all that is needed to keep them in good order and the reason locomotives are discarded is more because of obsolescence of type rather than depreciation of quality. We have locomotives on the road today that are over twenty years old that are perfectly good locomotives and are pulling trains, but they are too small. The C., B. & Q. had locomotives that were thirty years old that were perfectly good locomotives, but they were too small, and they are thrown away not because they have depreciated in quality but simply because the demands of commerce are so great that we buy a big one and use it instead of a little one." (Nor. Pac. Rec., p. 1252, et seq.)

Again we find the following in Mr. Elliott's testimony on the same subject.

"Now, you gave here figures for the amount invested in equipment August 30, 1907, or April 30th, somewhere along there.

A. Yes.

Q. Twenty-one millions for locomotives, in round numbers?

A. Yes.

Q. Seven and a quarter millions for passenger cars, and thirty to thirty-two millions for freight trains, and two and a half millions for work equipment?

A. Yes, sir.

Q. Was that the present value, allowing anything for depreciation or for new equipment?

A. That was put down as representing the value of that equipment, any place on the road, if you had to go and get it.

Q. New?

A. Yes, and place it there.

Q. And it allows now (I don't know that anything should be allowed) but it allows nothing for depreciation?

A. No, I didn't allow anything for depreciation in that item, for the reasons that I tried to give elsewhere: We be-

lieve we have kept it up in good shape." (Nor. Pac. Rec., p. 1355.)

Mr. Johnson frankly states the time when the additional charge was first made, as follows:

"Q. I want to compare Ex. 79-Elliott with Ex. 87-Johnson and Ex. 88-Johnson. Is there included in operating expenses in Ex. 79-Elliott any item or items which are not included in the operating expenses of the two prior years, 1906 and 1907?

A. Yes, the 1908 figures, under the classification of the Interstate Commerce Commission, include depreciation of equipment; and no depreciation, or practically none, was taken up in the years 1906 and 1907.

Q. I call your attention to Ex. 79-Elliott and ask you to indicate the depreciation items to which you refer.

A. Under the head of maintenance of ways and structures we have depreciation of work equipment, amounting to a total of $9,883.92.

Q. Can you tell what percentage of value was used to arrive at that figure?

A. Yes, sir; on work equipment we used six per cent per annum.

Q. Go on.

A. Under the head of maintenance of equipment there is depreciation of steam locomotives, amounting to $167,322.26; depreciation of passenger train cars, $59,756.75; and depreciation of freight train cars, $341,657.43.

Q. Can you indicate the percentage that was applied in each instance to produce the figures?

A. On passenger and freight train cars we used six per cent per annum, and on the locomotives we used five per cent per annum on the original cost, or, in the absence of a knowledge of the original cost, on the estimated cost of the equipment.

THE MASTER: As new?

WITNESS: As new, yes, sir." (Nor Pac. Rec., p. 3253.)

The annual report of the Northern Pacific to its stockholders, for the year ending June 30, 1908, also clearly shows the large duplication effected, in the following language:

OPERATING EXPENSES.

Maintenance of Equipment.

The charges for maintenance of equipment were $8,436,766.89, **an increase of $2,657,821.59 or 45.99 per cent,** the increase was due to monthly charges for depreciation of equipment made in accordance with the rules of the Interstate Commerce Commission, amounting for the year, as shown below, to $2,727,615.30.

(Authority: Annual Report of the Northern Pacific to its stockholders for the year ending June 30, 1908, page 7. We place one clause in heavy type simply to call attention to important statement.)

There are some strange discrepancies in the Great Northern figures. Maintenance of equipment costs for 1907 as given in the annual report of the company for 1907 were $5,622,513, while the same item for the same year as quoted again in the annual report of 1908 was $8,545,020, a difference of approximately three million dollars. No such discrepancy occurs in the quotations for any prior year. The total operating expenses for 1907—as given in the 1908 report—were about $3,000,000 greater than the figures representing the same item for the same year, but given in the report for 1907, the difference being closely analogous to the difference in the figures of the two reports representing maintenance of equipment for 1907; and the difference is probably due chiefly to an effort to reframe the figures in accordance with the new rules promulgated by the Interstate Commerce Commission, June 30, 1907.

If we adopt the figures of the Great Northern Company given in each annual report to its stockholders for that current year we find the maintenance of equipment to have cost as follows:

1905	$3,749,131
1906	4,820,649
1907	5,622,513
1908	7,917,318

Here again we see striking evidence of duplication in the 1908 maintenance of equipment figures, although not so frankly stated as in the case of the Northern Pacific.

In section 8 of the Master's opinion, appearing in Case No. 599, Vol. 1, p. 238, he concludes that depreciation on value of property should not be taken into account inasmuch as it is offset by various other items, and particularly because it "is taken care of by constant repairs, renewals, additions and replacements." But, here, as in many other points in the opinion, the Master erred and was inconsistent, in that he makes no comment and permits the charge of large items of depreciation in the operating accounts of both roads; although he has himself specifically stated this has been taken care of under repairs, renewals, additions and replacements. As will be seen by reference to Exhibit 47, Martin, in the Great Northern case, there is charged against the revenues for the year, and included in the operating expenses for Minnesota, under maintenance of way and structures, for renewal and depreciation of work equipment, $27,308.08, and under maintenance of equipment renewal and depreciation $1,073,738.57. In Exhibit 79, Elliott, in Northern Pacific case, there is in like manner charged under the maintenance of way and structures account, under depreciation work equipment, $9,883.92, and under maintenance of equipment accounts depreciation of $568,-736.44.

At page 1355, in treating of this subject in his direct examination Mr. Elliott says no allowance in the value is made for depreciation for reasons given elsewhere: "We believe we have kept it up in good shape." This testimony conforms generally to that of other witnesses in the cases, and is to the effect that not only do the roads endeavor to keep their equipment so that it shall not be subject to a reduction because of depreciation, but that they do *in fact enhance* its value by additions and betterments, charged to operating expenses, aside from any question of depreciation.

Mr. Johnson, page 3253, as shown above, touching on this question, says no depreciation, or practically none, was taken

up in the years 1906 and 1907; that for the year 1908 the charge to depreciation on work equipment was at the rate of 6 per cent per annum; and (p. 3254) it was at the rate of 6 per cent per annum on passenger and freight train cars and at the rate of 5 per cent per annum on locomotives. All these percentages being based on the original cost, or, in the absence of a knowledge of the original cost, on the assumed cost of the equipment new. Elsewhere in this testimony Mr. Johnson and Mr. Elliott tell us that the average life of freight and passenger train cars is at least twenty years, and the life of locomotives will average at least twenty-five years. Assuming that the amount set aside or proposed to be set aside, at this same ratio for depreciation would earn 4 per cent interest, then the entire passenger, freight and work train equipment would be renewed every 12½ years, and the locomotives every 15 years. In other words, it is proposed by the use of these arbitrary figures and charges that, notwithstanding, as has been acknowledged by them and as is interpreted by the Master, ample expenditures are made for keeping the equipment in better than 100 per cent value, yet in addition thereto they demand that they may be permitted to charge as against operating expenses enough every year so that they may be able to replace completely all passenger and freight cars when they are not more than 62½ per cent used up, and locomotives when they are not more than approximately 60 per cent used up.

For these reasons we believe the charges for depreciation should be deducted from operating expenses in the accounts of these carriers in these cases, inasmuch as the witnesses for the carriers have stated they keep their properties up out of expenses charged to repairs and renewals.

Further argument with regard to the depreciation item will be found in another part of the brief, and we leave the discussion of the detail to take up now, in view of the facts and arguments hereinbefore set out in connection with the accounting questions involved, the results which would reasonably and properly obtain if the proper factors of expenses as between freight and passenger traffic were applied, particularly as to maintenance of way and structures accounts and excluding

from the calculations the charges for depreciation improperly included in the accounts. Further than this no corrections are made, although a number of the other accounts, under the classifications, traffic expenses, general expenses, and transportation expenses, are subject to criticism and correction, but we feel that to show, as we think we have clearly done, that grave error has been committed in some of the essential parts will be sufficient to demonstrate to the court that the railroads have not, in attempting to make these cases, set out with that clearness and exactness, uniformly demanded of them by this court, the actual condition of affairs, and that being proven the decision must necessarily and ultimately be in favor of the law and as against the contention of the railroads.

The calculations and statistics follow in tables designated as Table I, II, III, IV, V and VI.

Table one makes comparisons between the Northern Pacific and Great Northern of results of operation, mileage, traffic, and efficiency as expressed by the figures taken from the annual reports made by the railroads themselves. The figures furnish all the explanation necessary to justify considerable differences in ratio of operating expenses to gross revenues.

Tables two and four show, for the Northern Pacific and Great Northern respectively, the gross ton miles for the freight and passenger traffic calculated on the basis heretofore fully explained and giving the proper ratio for separation of Maintenance of Way and Structure expenses as between freight and passenger traffic, and this is therein, on that plan, reapportioned, deducting first depreciation of $9,883.92. Continuing in same table, calculation is made as to the extra expense of operation chargeable to the intrastate business, basing the extra cost on the comparison of inter and intra haul within the state of Minnesota, as shown by the exhibits introduced by the railroads, and that ratio of extra cost is applied to transportation expenses, the balance of expenses, as per testimony of several witnesses referred to, being treated as equal per ton per mile and per passenger per mile, inter and intra; then, following the plan and the theory adopted by the Master,

the ratios so found are applied to the ton miles and passenger miles to find the equation and ratio of intra to inter expenses.

Tables three and five show, for the two roads respectively, the net results on basis set forth in tables two and four, the only reduction in expenses being for depreciation—the same plan of calculation being pursued as was adopted by the Master—but, Maintenance of Way and Structures expenses being apportioned between freight and passenger on ratio of gross ton miles. None of the other divisions of expenses being disturbed but taken as set out by the railroad company's witnesses, but the total of expenses are apportioned between intra and inter on basis of ratios and equations as found in tables two and four; the gross revenues and taxes are here given as found by the Master, and finally showing the cost per ton per mile and per passenger per mile, intra as compared to inter. The net operating income is shown for each class of business, and the values on which the net income would be an earning of four, five and six per cent, and showing also the values, on 6 per cent basis, after deducting estimated losses as found by the Master.

Table six makes comparison of various results and statistics, as found in and calculated from tables one to five, inclusive for the state of Minnesota, as between the Northern Pacific and the Great Northern, and finally a comparison of the ratio of freight operating expenses, as between inter and intra business, to gross revenue and demonstrating that taking into consideration the conditions surrounding the traffic ample allowance is made for extra cost of intra over inter in the conduct of the traffic when proper equation is made as to the revenue as well as traffic, giving full consideration to difference in haul and all conditions surrounding the business.

TABLE I.

MINNESOTA TRAFFIC AND MILEAGE STATISTICS.

For the year ended June 30, 1908

Excludes Non-rev. and switch miles. Mixed train—25% Pass., 75% Frt.	Northern Pacific	Great Northern
	Mileage—989.31	Mileage—2054.94
Passengers 1 mile 93A	153,247,320	184,395,509
Passenger miles per mile of road	154,903	89,732
Passenger train service revenue	$3,496,364.65	$4,306,546.24
Pass. train service rev. per M. of R.	$3,584.15	$2,095.70
Pass. train service rev. per train mile	$1.69389	$1.41626
Ton miles	1,091,290,482	2,123,744,733
Ton miles per mile of road	1,103,082	1,033,482
Total freight revenue	$9,509,077.33	$15,658,661.07
Total freight revenue per mile of R.	$9,611.83	$7,620.00
Total freight revenue per train mile.	$4.33833	$4.66240
Rev. locomotive miles—freight	2,342,745	3,323,017
Rev. locomotive miles—passenger	1,961,917	2,958,576
Rev. locomotive miles—mixed	149,000	141,027
Rev. locomotive miles—special	5,329	5,327
Total freight	2,454,495	3,428,787
Total passenger	2,004,496	2,999,160
Freight car miles—loaded	59,041,533	92,976,075
Freight car miles—empty	15,718,440	32,796,151
Freight car miles—caboose	2,105,579	3,390,948
Special freight—loaded	19,280	46,731
Special freight—empty	3,144	214
Special freight—caboose	1,200	2,696
Total	76,889,176	129,212,815
Passenger car miles—passengers	5,342,375	7,213,112
Passenger car miles—Sleep. Par. and Observ.	2,665,315	3,311,063
Pass. car miles—other pass. train cars	3,767,239	5,593,195
Passenger car miles—special passengers	6,939	7,181
Passenger car miles—Sleep. Par. and Observ.	1,464	5,842
Pass. car miles—other pass. train cars	3,767,239	5,593,195
Total	11,784,315	16,136,212
Rev. service train miles—		
Freight train miles	2,043,236	3,218,531
Mixed train miles	148,638	139,960
Special train miles	1,809	5,204
Passenger train miles	1,915,464	2,900,819
Total freight	2,154,715	3,323,501
Total passenger	1,954,432	2,941,013

TABLE II.

NORTHERN PACIFIC.

Gross Ton Mileage Statistics.

Passenger.

Pass. car miles—11,784,315 at 37½ tons....	441,911,883	
Pass. miles—153,247,320 at 150 lbs.....	11,493,549	
Bagg., mail & exp. train miles—1,915,464 at 5 tons	9,577,320	
Gross ton miles—passenger service....		462,982,682—16.18%

Freight.

Freight car miles 76,889,176 at 17 tons.....	1,307,115,992	
Freight rev. ton miles.....	1,091,290,482	
Gross ton miles—freight service.....		2,398,406,474—83.82%

Maintenance of Way and Structures.

Per exhibit 79—Elliott—	Freight	Passenger
Net amount stated	$ 799,320.09	$ 650,372.91
Plus credits Jt. tks. yds. and O. F.....	54,417.09	53,007.88
Less depreciation	5,248.46	4,635.46
Gross debits less depreciation.....	$ 848,488.72	$ 698,745.33
Total debits freight and passenger.....	$ 1,547,234.05	
Reapportioned on ratio of—		
Gross ton miles—frt. 83.82%, Pass., 16.18%	$ 1,296,891.58	$ 250,342.47
Less credits, Jt. trks., yds and O. F.....	54,417.09	53,007.88
Net chgs., Maintenance of Way and Struct..	$ 1,242,474.49	$ 197,334.59

Ratios for dividing all expenses on basis of equated ton and passenger miles.
Ratio of haul, intra to inter, freight 1.78 to 1.00.
Applied to transportation expenses only equals 1.4658 to 1 on all exp.
Ratio of extra expense assumed by Master on Passenger traffic 1.15.
Applied to transportation expenses equals 1.0881 to 1 on all expenses.

Intra ton miles.....130,580,988x1.4658	equals 191,403,612	equals 16.613%
Inter ton miles.....960,709,494x1.0000	equals 960,709,494	equals 83.387%
Intra Pass. miles..... 52,317,140x1.0881	equals 56,926,280	equals 36.062%
Inter Pass. miles.....100,931,180x1.0000	equals 100,931,180	equals 63.938%

TABLE III.

NORTHERN PACIFIC.

Operating Expenses.

	Freight.	Passenger.
Maintenance of Ways and Structures—Frt. 83.82%, Pass. 16.18%	$ 1,242,474.49	$ 197,334.59
Maintenance of Equipment, less depreciation	829,417.99	269,859.51
Traffic expenses, per Ex. 79	69,804.67	89,524.61
General expenses, per Ex. 79	98,844.18	71,829.25
Transportation Exp., per Ex. 79	3,118,371.89	1,089,268.66
Total Frt. and Pass. operating expenses	$ 5,358,913.22	$ 1,717,816.62

Freight.

	Intra.	Inter.
Gross revenue per Master's findings	$ 1,637,999.25	$ 8,376.435.94
Operating expenses—on ratio of equated ton miles; intra 16.613%—inter 83.387%	890,276.25	4,468,636.97
Taxes—per Master's findings	71,820.32	367,286.53
Net income	$ 675,902.68	$ 3,540,512.44
Equivalent to 4% on value of	$ 16,897,567.00	$ 88,512,811.00
Equivalent to 5% on value of	13,518,053.60	70,810,248.80
Equivalent to 6% on value of	11,265,044.66	59,008,540.66

If deduct estimated loss as stated by Master—$21,493.67—leaves intra earnings at rate of 6% on ..... $ 10,906,816.83

Passenger.

	Intra.	Inter.
Gross revenue per Master's findings	$ 1,259,013.01	$ 2,408,635.07
Operating expenses on ratio of equated passenger miles; intra 36.062%, inter 63.938%	619,479.03	1,098,337.59
Taxes per Master's findings	53,924.08	103,087.58
Net income	$ 586,509.90	$ 1,207,209.90
Equivalent to 4% on value of	$ 14,662,747.50	$ 30,180,247.50
Equivalent to 5% on value of	11,730,198.00	24,144,198.00
Equivalent to 6% on value of	9,775.165.00	20,120,165.00

Above apportionment of expense shows costs as follows:

Freight—mills per ton per mile	intra 6.818	inter 4.651
Freight including taxes p. t. p. m	intra 7,368	inter 5.034
Passenger—cents per pass. mile	intra 1.184	inter 1.088
Passenger including taxes, per mile	intra 1,287	inter 1.190

TABLE IV.

GREAT NORTHERN.

Gross Ton Mileage Statistics.

	Passenger.	
Pass. car miles—16,136,212 at 37½ tons..	605,097,950	
Pass. miles—184,395,509 at 150 lbs.....	13,829,663	
Baggage, mail and express—		
Train miles, 2,900,819 at 5 tons.....	14,504,095	
Gross ton miles—passenger service		633,431,708—12.79%
	Freight.	
Freight car miles 129,212,815 at 17 tons..	2,196,617,855	
Freight rev. ton miles.....	2,123,744,733	
Gross ton miles—freight service....		4,320,362,588—87.21%

Maintenance of Way and Structures.

Per exhibit 47, Martin.	Freight	Passenger
Net amount stated.....	$ 1,905,856.44	$ 1,328,835.87
Plus credits Jt. trks. yds. and O. F.....	66,733.56	60,516.80
Less depreciation	15,565.69	11,742.39
Gross debits, less depreciation.....	$ 1,957,024.31	$ 1,377,610.28
Total debits, freight and passenger.....	$ 3,334,634.59	
Reapportioned on ratio of—		
Gross ton miles, frt. 87.21%, Pass. 12.79%.....	$ 2,908,134.83	$ 426,499.76
Less credits, Jt. trks. yds. and O. F.....	66,733.56	60,516.80
Net chges, Mtce. of Way and Struct.....	$ 2,841,401.27	$ 365,982.96

Ratios for dividing all expenses on basis of equated ton and passenger miles.

Ratio of haul, intra to inter, freight 1.55 to 1.00.

Applied to transportation expenses only, equals 1.2769 to 1. on all expenses.

Ratio of extra expense assumed by Master on passenger traffic, 1.15.

Applied to transportation expenses equals 1.0756 to 1. on all expenses.

Intra ton miles.....171,317,766x1.2769	equals	218,755,655	equals 10.076%
Inter ton miles.....1,952,426,967x1.	equals	1,952,426,967	equals 89.924%
Intra Pass. miles.....92,053,657x1.0756	equals	98,912,913	equals 51.718%
Inter Pass. miles.....92,341,852x1.	equals	92,341,852	equals 48.282%

TABLE V.

GREAT NORTHERN

Operating Expenses.

	Freight	Passenger
Maintenance of Way and Structures—Freight 87.21%, Passenger 12.79%	$ 2,841,401.27	$ 365,982.96
Maintenance of Equipment—Less depreciation	1,154,290.58	457,679.85
Traffic expenses, per Ex. 47	131,311.40	116,530.14
General expenses, per Ex. 47	148,259.98	101,347.24
Transportation expenses, per Ex. 47	3,921,805.03	1,471,759.25
Total Frt. and Pass. operating expenses	$ 8,197,068.26	$ 2,513,299.44

Freight.

	Intra.	Inter.
Gross revenue per Master's findings	$ 2,463,388.68	$ 13,837,342.63
Operating expenses on ratio of equated ton miles; intra 10.076%, inter 89.924%	825,936.60	7,371,131.66
Taxes, per Master's findings	99,761.00	560,383.19
Net income	$ 1,537,691.08	$ 5,905,827.78
Equivalent to 4% on value of	$38,442,277.00	$147,645,694.50
Equivalent to 5% on value of	30,753,821.60	118,116,555.60
Equivalent to 6% on value of	25,628,184.66	98,430,463.00

If deduct estimated loss as stated by Master—$87,261.43—leaves intra earnings at rate of 6% on 24,173,827.50

Passenger.

	Intra.	Inter.
Gross revenue per Master's findings	$ 2,178,440.90	$ 2,352,145.36
Operating expenses, on ratio of equated Pass. miles, intra 51.718%, inter 48.282%	1,299,828.20	1,213,471.24
Taxes per Master's findings	86,421.46	93,312.46
Net income	$ 792,191.24	$ 1,045,361.66
Equivalent to 4% on value of	$19,804,781.00	$26,134,041.50
Equivalent to 5% on value of	15,843,824.80	20,907,233.20
Equivalent to 6% on value of	13,203,187.33	17,422,694.33

Above apportionment of expenses shows costs as follows:

Freight—mills per ton per mile	intra 4.821	inter 3.775
Freight including taxes per ton per mile	intra 5.403	inter 4.062
Passenger—cents per passenger per mile	intra 1.412	inter 1.315
Passenger including taxes per passenger per mile	intra 1.506	inter 1.415

TABLE VI.

COMPARATIVE.

Gross Ton Mile and Costs Statistics Based on Preceding Exhibits.

Northern Pacific		Great Northern
	Freight.	
2,454,495	Locomotive miles	3,428,787
76,889,176	Car miles	129,212,815
31.32	Car miles per locomotive mile	37.68
2,398,406,474	Gross ton miles	4,320,362,588
977	Gross ton miles per locomotive mile	1,260
31.2	Gross ton miles per car mile	33.4
35.5	Gross ton miles per loaded car M	38.8
2.19	Gross ton miles per rev. ton mile	2.03
18.48	Average tons frt. per loaded car mile	22.84
497.88	Average tons frt. per train mile	632.35
35.07	Average freight cars per train mile	38.46
2.234 mills	Operating expense per gross T. M	1.897 mills
	Passenger.	
2,004,496	Locomotive miles	2,999,160
11,784,315	Car miles	16,136,212
5.88	Car miles per locomotive mile	5.38
462,982,682	Gross ton miles	633,431,708
231	Gross ton miles per locomotive mile	211
39.3	Gross ton miles per car mile	39.2
3.02	Gross ton miles per rev. Pass. M	3.44
13	Average passengers per car mile	11
74	Average passengers per train mile	61
5.70	Average passenger cars per train mile	5.30
3.71 mills	Operating expense per gross ton mile	3.97 mills

Freight Operating Expense to Revenue.

	Intra.	
54.35%	Expenses to actual revenue	33.54%
78.31%	Expenses to equated revenue	68.06%
	Inter.	
53.34%	Expenses to revenue	53.27%

So far as terminal expenses are concerned and so far as road bed expenses, including both construction, original and current maintenance expenses, are concerned, it costs substantially the same to handle a ton at such a terminal or to haul a gross ton across a mile of such a road-bed, whether that ton is destined fifty miles away to a point within the state, or two thousand miles away to a point on the Coast. The fallacy of adopting any such sweeping generalization as the proposition that it costs two and one-half times as much to haul

a ton of interstate business one mile as it does to haul a ton of intrastate business a mile, is certainly self evident, in view of these two fundamental errors from which that deduction was made:

First, the failure to find the facts as to the proportion of state and interstate traffic in local and through trains respectively.

Second, the erroneous comparison of the average length of hauls on system traffic and Minnesota intrastate traffic.

Such loose methods of comparing costs by a gross percentage of that character, have caused some striking differences in various states. The courts have guessed this proportional of the state expenses above interstate expenses all the way from 10 per cent up to 300 per cent.

There is no reason why Court or Master could not have guessed, in the Minnesota cases, that proportional to be 1 to 1.10, 1½, 2, 2½, 3, 4, or 5 upon the kind of testimony we have cited, which is typical of the entire record in the cases upon this proposition, and when one realizes that the Master's findings as to what the expenses truly are, determines the results in this litigation, it must be conceded that such methods as those pursued by the Master are unreasonable and cannot possibly be accepted for the purpose of these cases. Upon precisely the same kind of testimony from the same and other witnesses in the Missouri cases Judge McPherson found the rate to be 1 to 1½.

Various state commissions have been insisting during the trials of these various cases in the federal courts, upon a sensible, sane method of division of operating expenses. This division cannot be made by a superficial guess, or in a wholesale manner; the position thus taken by the railway commissions of these various states, has recently received confirmation in the action of the Master in the Alabama rate cases. In support of our position we call the court's attention to the Special Master's report in *Louisville & Nashville Railroad Co. v. Railroad Commission of Alabama, et al.*, pending in the

U. S. Circuit Court, Middle District of Alabama. In regard to this subject, the said Master found as follows: "The unit of service basis or plan is the result of an effort to divide operating expenses between interstate and intrastate traffic, without reference to the revenue in accordance with the service rendered or required.

"There exists considerable difficulty in such an undertaking, for the reason that the business carried on by railroads consists of two quite dissimilar large divisions—the freight traffic and the passenger traffic. It is impossible, of course, to compare a passenger with a ton or a passenger mile with a ton mile."

The Master, fully realizing the complicated character of the questions involved, called a conference of the accounting officers of various lines, and they considered in detail the various known plans of dividing operating expenses between state and interstate business, and between passenger and freight, and between states. This conference was held at Atlanta, Georgia, in the months of September and October, 1909, in response to a request; the result of this conference was that a formal resolution was adopted by the railway officials endorsing the unit of service basis. The following was the resolution adopted:

"Resolved, That in the separation of operating expenses as between interstate traffic and intrastate traffic upon a unit of service basis, freight and passenger expenses should first be divided as between haulage and non-haulage items and general expenses, and that freight haulage items should be apportioned to interstate and intrastate traffic on basis of the number of ton-miles in each class, equalized or adjusted to local conditions; that freight non-haulage items should be apportioned on basis of tons so equalized or adjusted; and that general expenses should be apportioned on basis of haulage and non-haulage items so divided; and that passenger expenses should be similarly divided on basis of equalized or adjusted passenger miles or passengers."

Further, in regard to the fairness of this basis, the said Master states:

> "The fairness and reasonableness of the Unit of Service basis as a method or plan of dividing operating expenses has also been testified to specifically in this case by experienced traffic, operating and accounting officers, both those connected with and those not connected with complainant company. And this testimony as to the fairness and reasonableness of the plan relates not only to the separate steps or parts of the method but also to the results reached as a whole."

The record in these Minnesota cases shows that the railroads themselves have recognized and adopted the unit of service or use basis for dividing expenses among themselves at the principal terminal in Minnesota. Mr. Ward, testifying for the Great Northern, said:

> "All of the tonnage passing through these terminals is counted both for the road which brings the tonnage in and the road which takes it out, and the total expense of the Minnesota Transfer is apportioned among the roads that are members of the company, in the proportion that their tonnage bears to the total." (Grt. Nor. Rec., 1106.)

The plan adopted in Alabama, with the sanction of the conference of railway officials, is, in principle, in entire harmony with the position taken by your petitioners for many years, and we believe it should now meet with the approval of the Supreme Court, as opposed to the wholesale guess indulged in by the Master and the lower court in these Minnesota Rate Cases.

Accuracy and justice must not be sacrificed for simplicity and ease. This court should not sanction the use of simple methods for arriving at a conclusion at the expense of accuracy, no matter how laborious, intricate or complicated may be the method required to reach the true solution of the problem.

PART IV.

THE EVIDENCE IN THIS RECORD IS WHOLLY INSUFFICIENT TO FURNISH ANY BASIS WHATSOEVER FOR THE DETERMINATION OF WHAT IS A REASONABLE RATE OF RETURN UPON THE VALUE OF THE PROPERTIES INVOLVED.

There is a plain distinction which must be recognized between a reasonable rate of return existing in ordinary business of the character under consideration, and that minimum rate of return below which is confiscation. It, of course, must be conceded by the appellees, that if a proper accounting of revenues, expenses, and value of the properties belonging to the railway companies, will show a return equal to or greater than the ordinary reasonable rate received in this and other analogous business of equal hazard in this and similar territory, then the rates fixed by the Minnesota Commission must be sustained by this court. It therefore becomes of paramount importance to determine what is a reasonable rate of return in this character of business. The conclusions reached upon this proposition are of profound importance to your petitioners in this brief, the Commissions of Missouri, North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, Texas and Iowa.

There is no testimony whatsoever shown in this record which even purports to give the ordinary rate of return the investing public expects or receives on investments of this character in this section of the country.

Mr. Hill's testimony is devoted to broad generalizations as to the relative hazard in the railroad business compared to banking, real estate, and other kinds of enterprises. Mr. Hill, Mr. Staples, and the table introduced, all utterly fail to give any facts whatever as to what rate investments in railway or other enterprises are able to command in this locality.

The meagreness of this entire record upon the question of the rate of return, is emphasized by the fact that of the nineteen volumes of record including seven thousand five hundred printed pages of testimony, all of the evidence specifically referring to any rate of return can be printed on less than two pages. Thousands of pages are devoted to the determination of proper sums representing value, and two pages devoted to the proper rate of return; and yet an erroneous variation of 1 per cent in the rate is equal to a variation of many millions of dollars in the value.

There are many pages devoted to philosophizing about the subject, but no concrete facts showing what this line of business, or any other line, returns to actual investors, at the present time, were presented to the lower court. This is true, although the figure at which this rate of return will be finally placed by this court, will effect hundreds of millions of dollars in the Middle Western states. The conclusions this court reached as to a reasonable return upon investments in the gas business can have little necessary connection with the returns upon investments in the railroad business, and yet practically every one of the decisions of the district and circuit federal courts and special masters, rendered during the past year, has used the *Consolidated Gas case* as substantially a controlling precedent. When the federal court has under consideration the reasonableness of a return upon investments in the gas business, it had evidence before it upon which to base its conclusions. The record in that case showed extended testimony upon the question of what per cent is a reasonable rate in that industry, (at pages 1697, 1698-9, the testimony of Messrs. McMillan, Bertron, Forbes, and Carter, as shown at pages 807-8, 1676-8, Complainant's Exhibits 225-234, pp. 5281-8, the testimony of Prof. Bemis shown at page 2672, the record at pages 2673, 5043-5, 6212, 1321, Mr. Moyer, 1685, 114-119, 1674, 1798, 1823, 1801, 2762, 4762, 2353, Dr. Humphreys 1689, 1836, Mr. Greene 1263, etc.) The possibility of new inventions is a constant hazard which must be reckoned with in the gas business. Next year a large part or the entire plant may be displaced. These factors are reflected in the returns de-

manded by investors in gas enterprises. The record in that case has testimony as to the actual facts. Here we have nothing but conclusions and generalizations.

The real purpose of counsel for the carriers in drawing out this character of testimony on the cross examination of Mr. Staples in the present case is best disclosed by the following passage from the record. Mr. Butler, of counsel for the carriers, in explanation of his examination of Mr. Staples of the Minnesota Railroad & Warehouse Commission, (Nor. Pac. 2851) upon this question of reasonable rate, made the following statement to the court:

> "This witness says the Commission has made a schedule of reasonable maximum rates, and he has told us that, in order to do that, they have to determine what is a reasonable rate of return on this property; and now, it is true, I think, that it is for the Court, ultimately to say what is reasonable, but if this witness has an opinion that is lower than what the Court would say is reasonable, then it could say that the Commission proceeded on a wrong theory and manifestly they are not justified in this because they built to a theory that we will not approve, and it would save the Court and the Master a great deal of work if it should develop that way. On the other hand, if the experts upon the subject (and I consider Mr. Staples one, because he has studied this matter a great deal) are of opinion that a very considerable rate of return is right, that would be helpful to everybody who has to decide the case, and unless it does embarrass Mr. Staples to give an answer to the question as put, I would not be willing to withdraw the question out of deference to the objection."

The real purpose of Mr. Butler's cross examination was plainly stated to be in order to lay a foundation for the overthrow of the Commissioners' rates on the ground that they had proceeded upon a wrong theory, adopting as their basis a rate less than the lawful rate of return to which the carriers were entitled. The reverse of this should also be true. It is far from our purpose in a litigation of this public character to insist upon anything which savors in the slightest degree of being technical, but the rights of the public are as great as

those of the carriers, and if upon a virtual trial *de novo* this court should find this rate of return adopted by the Commission to be too high, and, when applied to a corrected value (different from that found by the Commission), to make a return greater than that actually earned by the carriers, then in that case this court should correct that finding as to what is a reasonable rate, and remand it back with instructions that it shall be again referred to the Commission for further investigation. This court can find the adoption of wrong principles or pursuing wrong methods by the Commission and correct the same equally well, whether they refer to the value or to the rate of return. Values are just as much questions of fact as rates of return; the conclusions of the Commission relative to reasonable rates of return are just as much the subject of investigation and correction by this court in this trial anew before this tribunal, as are the conclusions of the same Commission on values.

The testimony of Mr. Staples which goes to the question of the reasonableness of the rate of return is as follows:

> "After the courts have found what is the value of the property necessarily involved or used in the transaction of the business for which the company is organized (that is, the transportation business) I would feel that it ought to be assured of as much as seven per cent. That is, the seven per cent, of course, applies to this value, and necessarily implies that all fixed charges and other proper costs of management, operation, etc., shall first be met.
>
> Q. Including depreciation, etc?
>
> A. Yes, sir. Yes, sir, all other proper costs. In other words, I hold, in a general way, as I view the railroad problem, that a company is entitled to keep up its property out of the earnings; that is, that that is not a proper charge against capital. If I make myself plain I will not elaborate upon that point at all. (Nor. Pac. 2852.)
>
> Q. As to the road less favored, you did not intend to refer to that, when you fixed seven per cent?
>
> A. Well no, but I did say that I had in mind a road which was reasonably located and had reasonable control of traffic and was reasonably well managed. I do not feel, Mr. Butler, that I ought to be asked to single out different

roads and give my opinion as to their worth or their value or the way they are managed. (Nor. Pac. 2859).

A. The State should not (when I say the State, I refer to the governmental authority) contend for a minute that, because a company is getting, if seven per cent is held to be reasonable, is getting it this year, next year, because of some calamity or misfortune, it results in giving but two or three per cent, it is perfectly justified in going on and claiming that seven per cent is all that they should have the next year. In other words, that, so far as it is possible to do so, that should not be exactly a guaranty but the idea is that they are entitled to that much, that they ought to have that much; that the investment, the character of the investment—

Q. Is this thought a proper one, in justification of your opinion, that the rates should be fixed so that in good times or times of prosperity they would be able to provide for the poor times, the fat years provide for the lean years, by laying away a surplus from the good years to help them out in the bad ones?" This was agreed to by the witness. (Nor. Pac. 2861.)

We have the highest regard for Mr. Staples as a gentleman, and of his great ability, absolute integrity, and unquestioned fairness, yet we beg leave of the Court to notice that this record shows that the schedule of rates involved in this proceeding is the first and only general schedule ever promulgated by the Commission of which Mr. Staples is a distinguished member, and that never before in his life, so far as this record shows, has Mr. Staples ever had occasion to consider the question of what constitutes a reasonable rate of return.

In the examination of Mr. Staples upon the question of what is a reasonable rate of return (Nor. Pac. 2849 et. seq.) there was no evidence offered going to show that he had made any investigation of the actual rate of return upon investments in railway securities or those of any other industries. Both counsel for the state and counsel for the carriers agreed (Nor. Pac. 2851) that the question of what is a reasonable rate of return is a question for the court to determine. If it is a legal question, Mr. Staples' testimony is not competent; if it is a ques-

tion to be determined from facts introduced as to the actual returns from investments in that locality, then also Mr. Staples' testimony is not competent, for he introduced no facts whatever, and at no time in his examination or cross-examination did he refer to a single fact from which he deduced his opinion or conclusion, nor did he state that he based his conclusions upon such facts, or ever had investigated the same.

The only other evidence in the entire record upon the question of what is a reasonable rate of return is the following statement taken from the official report of the Comptroller of the Currency to the Speaker of the House of Representaitves for the year 1907:

AVERAGE RESULTS OF THE BUSINESS OF THE NATIONAL BANKS OF THE UNITED STATES, FOR THE PERIOD OF THIRTY-EIGHT YEARS, FROM 1870 TO 1907, INCLUSIVE, AS SHOWN BY THE OFFICIAL REPORT OF THE COMPTROLLER OF THE CURRENCY TO THE SPEAKER OF THE HOUSE OF REPRESENTATIVES, FOR THE YEAR 1907.

Page 240.

Capital	$ 578,251,374
Surplus	205,100,039
Capital and surplus	783,357,413
Dividends paid	50,660,236
Net earnings	66,647,167
Dividends to capital	8.76%
Dividends to capital and surplus	6.47%
Net earnings to capital and surplus	8.58%

Average results of same business for 10 1-3 years, March 1, 1897, to June 30, 1907. Computed from same statistical table:

Capital	$ 672,072,739
Surplus	319,604,317
Capital and surplus	$ 991,677,056
Net earnings	97,640,179
Net earnings to capital and surplus	9.84%

This can be no standard whatever for a reasonable rate of return upon the fair value of the properties involved in this proceeding. The capital of national banks is limited to original investments in cash; if the carriers are willing to adopt such a standard in this case, then the rate might be

analogous so far as it relates to the basis upon which the return is earned. The wide margin between cash investment and capitalization is illustrated in this case by the testimony of Mr. Gray wherein he only claimed the cash investment in the Northern Pacific to be $279,811,715, while the capitalization, exclusive of the Northern Pacific-Great Northern joint bonds, was $405,796,392.65. (In that cash investment there are many factors which should be excluded, and the capitalization represents values not included in the Northern Pacific railway proper.) It is common knowledge that the capitalization of our railroads is not representative of their value.

In the masterly opinion of the Interstate Commerce Commission in what is commonly called the *Western Advanced Rate Case,* written by the eminent Commissioner, Mr. Lane, it is stated: "This commission cannot accept capitalization as representing either investment or value. As conservative an authority as Judge Noyes may be quoted to the effect that 'Stocks are watered, anticipated profits are capitalized in advance, a large volume of securities is deemed desirable for speculative purposes. Therefore,' he says,' fictitious capitalization is not an element of value. The amount of the outstanding stocks and bonds is seldom any true measure of worth.' "

> *In re Investigation of Advances, etc.,* 20 I. C. C. Rep. 307, 320.

We do not need to burden this brief with innumerable citations from former decisions of the Court, or of the Interstate Commerce Commission to demonstrate that truth; it is too widely accepted to need discussion. In fact the carriers in this case make no serious claim of any substantial relationship between capitalization and original investment.

A fair comparison to determine what the investing public today considers a reasonable rate of return would be to find at what rate they are willing to invest in the stock of these national banks. This can readily be found and would have been information to the point on the question before us. The data given about dividends on capital stock and surplus of na-

tional banks in America is worthless because there is no parallel to conditions surrounding the business, the locality of the business, or the basis for the return upon investments in railway properties.

Mr. Hill's testimony does not deal with actual rates of returns in this locality on investments in railway properties or in any other class of industrials. Mr. Hill devotes his entire discussion to the relative hazard in the railway business compared to ordinary manufacturing, banking and other enterprises. In contrast with the assertions of Mr. Hill, who is in the highest degree a thoroughly and shrewdly interested party to the proceeding, we beg leave to call this Court's attention to a recent decision of the Interstate Commerce Commission, a disinterested tribunal, wherein the opinion was written by one of the greatest experts in this department of thought and research which this generation has yet produced, one whose findings of facts have always commanded the respect and approval of this Court, without a single exception. The following is Commissioner Prouty's conclusion concerning this fact as to whether railway investments are hazardous or not, and is taken from the opinion written by Mr. Prouty in the *Eastern Advanced Rate Case* last spring:

"The rate at which money can be obtained depends upon the certainty with which principal and interest are likely to be paid, and freedom from individual responsibility in making and caring for the investment. A high-grade municipal bond, where the element of risk is eliminated and where the only ability required from the investor is the capacity to cut off a coupon or indorse an interest check, sells at an extremely low rate of interest. Now, in both these respects the railroad investment is attractive.

"While talent of the highest order is required to finance and operate these great enterprises, and while very large salaries are paid to the individuals who perform these duties, still those salaries are all a part of operating expenses and are paid for by the property itself before the net return is

computed. No ability is required upon the part of the investor.

"The element of risk is less here than in most industrial operations. In private enterprise there is continual danger of competition. No matter how well established the business, nor how profitable the present return, there is always the hazard that some other article may take the place of the one produced, or that some other factory may produce the same article at a less price. This possible competition imperils the existence of the investment itself as well as the annual return. * * * * *

"It is certain that the present business of our great railroad systems must continue and even increase. Unless our entire social structure is to be revised, unless our industrial and commercial processes are to be radically changed, it seems certain that the traffic of our railroads must not only continue, but grow. To this there will, of course, be local exceptions, but broadly considered, the statement is true.

"There is but little competition in the price at which the commodity produced by these railroads, viz., transportation, is sold; that is, in the rate. This was not always so. In the past the most violent competition in railway rates has prevailed, and this competition has often gone to the point of imperiling the financial integrity of great railroad systems; but all that is a thing of the past. The law itself practically forbids it, and if it were permitted by law it is inconceivable that the practices of former years would recur.

"These carriers find no difficulty today in advancing their rates, as the present proceeding abundantly testifies, and the Constitution of the United States protects them against an unreasonable reduction of the rates which they establish.

"What business can be more attractive to the investor than this, in which no rival is to be apprehended, where the amount of business is assured, and where the price for the transaction of that business is protected by the fundamental law of the land."

In re Investigation of Advances, Etc., 20 I. C. C. Rep. 243, 260.

These comments were made in the Eastern case applying to all carriers east of Chicago and St. Louis and north of the Potomac and Ohio Rivers; but the extracts we have given apply equally to the railroad situation generally, throughout the country, as the statements themselves show.

Mr. Staples gives his conclusion, without showing any familiarity with the very large investments of the character under discussion. He gives his conclusion, without having made any investigation whatsoever, so far as the record shows, of the actual return demanded by the investing public in this class of investments. Mr. Staples, like Mr. Hill, utterly fails to give any facts whatever as to what rate investments of a similar character are able to command in that locality. The commissions we represent can under no consideration adopt the conclusions announced; we believe they are wholly unwarranted, and if followed by the Supreme Court they will work a grievous wrong upon the public in this section of the country.

The only actual facts which the record purports to show is the return National banks have been securing in the country as a whole on their capital during the past thirty-eight years. It is such a long, far cry from original investments in National banks all over America to present value of railroads in Minnesota, that the comparison is merely an interesting curiosity. There is such an abundance of evidence of the most reliable character available that no time need be consumed discussing further such far-fetched comparisons.

Judge Sanborn makes the following sweeping generalization without a shred of evidence in the record to support it, after stating the legal rate of interest to be 6 per cent in Minnesota, in the absence of contract, with a maximum limit of 10 per cent by contract; he says: "Rational investments in agricultural, manufacturing, mercantile, and other industrial pursuits, and even well secured loans, yield returns in Minnesota corresponding with these lawful rates." (Nor. Pac. Rec. Vol. 1, page 431.) That there was no effort to prove

these facts is plainly evidenced by the brief of complainants before Judge Sanborn, in which they frankly concede the following:

Concession of Carriers.

"Precisely what such rate of return should be, the complainants have not attempted to show; they have considered this question to be one for determination by the Master and by the Court upon all the evidence in the case, and upon general business conditions in the country where railways are situated. These are matters of common knowledge among business men, and of them the courts will take notice without specific proofs. To be fair and reasonable, the return upon a railway investment, judiciously made, could not under any circumstances be smaller than the average of those upon investments and business enterprises in general in the same region, taking into account the hazard attending the several classes."

During the past few months, numerous federal courts have passed upon this same question with equal ease, in entire absence of any evidence upon the subject, and with apparent indifference as to the far-reaching character of their conclusions; although an error of a fraction of 1 per cent in the rate of return is equivalent to an error of millions of dollars in value, and will have precisely the same effect on the result.

How is the question of the reasonableness of the rate of return to be determined? Is this question to be answered arbitrarily by the law-making body, or can the trial court just as arbitrarily determine upon the percentage that must be allowed by the legislature or commission? How is the question to be answered? This can be determined by a comparison of the rates of return to the complainants under the legislation in question with the rates of return that the investing public receives for the money it invests in the securities of other railroads and other kinds of business.

Necessity for Evidence.

What rate does the investing public receive for its money? This is a question of fact. How is the court to learn this fact? A proper answer to this question involves an examination into the records of such transactions as will disclose that fact. The general great outline of the methods of the business world may be judicially noticed by the courts, but the details of those methods, the risks that attend particular kinds of business, the rate that one kind of business yields above that of another kind, are questions that can best be answered by the introduction of evidence in the trial of the case. What rate does the investing public accept for its money is a question that should be determined upon evidence.

As this court stated in *Willcox v. Consolidated Gas Co., etc.*, 212 U. S. 19 (at page 48):

> "There is no particular rate of compensation which must in all cases and in all parts of the country be regarded as sufficient for capital invested in business enterprises. Such compensation must depend greatly upon circumstances and localities; the amount of risk in the business, as well as locality where business is conducted; and the rate expected and usually realized there upon investments of a somewhat similar nature." *Willcox v. Consolidated Gas Co.*, 212 U. S. 19.

In *San Diego Water Co. v. City of San Diego*, 118 Cal., 556, Harrison J. (concurring with majority of court) said:

> "What may be the lowest rate of interest upon an investment depends upon so many circumstances that no particular rate can be predicated in advance of any particular investment, but it is in all instances a question of fact and not of law, and is not to be determined by the judiciary."

Can the courts take judicial notice that the financial world is willing to make investments in railroad stocks or bonds, in bank stocks, industrial stocks, industrial bonds or municipal securities, at par, at four per cent, four and a quarter per cent, four and a half per cent, or five per cent? If the trial

court is to know these things, they should be established by the evidence.

Decisions Must be Reversed.

If evidence should have been introduced to show the rate of return to the investing public generally upon this class of investments; and the record shows that no evidence has been introduced upon that question, then the judgment of the trial court cannot be sustained, it must be either reversed or remanded back for the further taking of evidence.

SOME DECISIONS INDICATE THAT JUDICIAL NOTICE WILL BE TAKEN OF THE FACTS AS TO WHAT CONSTITUTES A REASONABLE RATE OF RETURN.

There is only one way to escape the consequences following the failure on the part of the complainants to introduce competent evidence upon the actual rate of return to investors, and that is that courts in the trial of rate cases may, as suggested above, take judicial notice of the rate of return to the investing public; as was claimed by counsel for complainants in the lower court.

For the purpose of argument, we will assume then, that the court in the trial of these cases properly took judicial notice of the rates of interest on money loaned, and of returns on investments made, and concluded that the rates of return allowed by the freight and passenger rates contested would not yield sufficient to enable the rates so contested to escape the charge of being confiscatory. If the trial court in these cases did not and could not take judicial notice of those facts necessary for the guidance of the court in determining what is a reasonable rate of return, then those cases must be reversed, because no evidence was introduced to establish the necessary facts. If the trial court properly took judicial notice of those facts, it necessarily follows that this court in reviewing these suits can and must also take judicial notice of the same facts; and if the trial court drew erroneous conclusions from these facts,

then the judgments, orders and decrees complained of should be set aside and these suits be sent back for further proceedings to correct these judgments, or this court should enter such judgments.

In the discussion of this subject, the court may consider well known economic facts as part of the common knowledge, of which the court will take judicial notice; or else the cases should be remanded back to the Commission for the taking of testimony upon this subject. As illustrative of matters of this character of which the courts will take judicial notice, and also as furnishing data of importance upon this subject, the decision of the Supreme Court of Minnesota a few years ago, in the well known case of *Steenerson v. Great Northern Railway Co.*, 69 Minn., 353, is in point. In that case the court made the following comments upon this subject:

> "The rate of interest on money and the ordinary rates of income on capital invested have fallen enormously in the last few years. Everyone knows this, and the court which does not know it is certainly not fit to review the acts of a Commission that should know it. Prof. Farnham of Yale, in Yale Review for August, 1895 (volume 4, pp. 199-201) gives statistics to prove that since 1873 rates of interest had up to that time fallen 52 per cent. They have fallen greatly since. The London Economist of July 3, 1897 (page 948) states that in Great Britain, within the last six months, large loans have been placed by the cities of Glasgow, Leeds and Brighton at less than 2 1-2 per cent interest per annum, and that the bonds of those cities, drawing that rate of interest, sold above par. Every court ought to know that there is now, and has been for some time, a glut of capital in the world's markets. For a long time the great wars of the world absorbed the principal portions of the world's surplus capital. This ended in 1871, with the Franco-Prussian War. For more than 20 years after that, enormous amounts of the world's surplus capital were absorbed in constructing railroads and other internal improvements. But this capital, unlike that consumed in the wars, earned enormous amounts of income, which were again added to the world's surplus capital seeking new investments. Modern improvements, resulting in increased production, and other causes, have,

in progressive countries, been accumulating vast amounts of capital. The amount of such capital seeking investment has increased, while the demand for same has fallen. And, where there are two dollars of idle capital to one dollar of safe investment, the effect is the same as where there are two workingmen to one job. The amount of hire is reduced. The competition of capital with capital is continually cutting down the profits on investments and the rates of interest on money."

In *New Haven Trust Co. v. Doherty, et al.*, 74 Conn., 51 Atl. 130, the court stated: "All men know, and therefore we must take judicial notice, that in 1895 the current rate of interest on moneyed securities exceeded 1¾ per cent. The best test of market value is ordinarily that of market sales."

In *Collins v. Wardell*, 63 N. J. Eq. 371, McGie, Ch., held that it is a matter which may be judicially noticed that the return upon safe investments has been continually diminishing for many years, reaching the general level of a 4 per cent basis at the time of the decision.

In the case of *Willcox v. The Consolidated Gas Co.*, 212 U. S. 19, the lower court took judicial notice of the market prices of stocks and bonds.

Judge Sanborn, in the cases at bar, took judicial notice of what he personally thought was the ordinary rate of return upon investments "in agriculture, manufacturing, mercantile, and other industrial pursuits." *Of all the recent decisions in the lower federal courts upon questions of this character raised in railroad rate cases, no judge, and no Master has made any analysis of the actual returns investors are in fact securing in this or other enterprises at the present time or in the past.* The decisions are full of sweeping truisms about the necessity to consider the character of the business, whether the property is properly built, properly managed, etc., but there is no effort to find out what returns are being received by investors, and what they demand before they put their money into the stocks and bonds of railroad companies or other similar enterprises.

What Is a Reasonable Rate of Return?

What is a reasonable rate of return, is a question of fact depending upon the circumstances of each case, the locality and character of the investment, etc.; while the question as to what are the correct methods for determining a reasonable rate of return, for any business, is one of law.

The true significance of a small variation in a percentage is seldom fully appreciated.

In the *Brunswick Water case,* several years ago, Mr. Leonard Metcalf, a civil engineer of standing, advanced the thought that a company is entitled to a so-called "profit increment," over and above the value determined by considerations of the cost of reproduction, original investment, and the other factors ordinarily named. Mr. Metcalf claims this profit increment should range from 20 to 50 per cent. In the *Livermore Falls Water Works* valuation, he placed this "profit increment" at 33 1-3 per cent. The counsel in the case, more adroitly perhaps, allowed for this same percentage, not on the value of the plant as Mr. Metcalf insisted was the correct method, but by adding it to the ordinary money interest rate in that locality, so as to find "a reasonable rate of return." While the final figures are identical, the effect on the mind of the two methods used is amazingly different. Mr. Metcalf, in the case referred to, added $21,325 to the original cost amounting to $65,475; while counsel in the case adopted 1.25 as the "ratio of profit to capital cost," using 6⅞ per cent as a reasonable rate of return, assuming the cost of capital to be 5½ per cent. Variations of a fraction of 1 per cent seem so insignificant we are far more apt to overlook or accept them as approximately correct, while a concrete sum amounting to $21,000 to be added to $65,000 immediately challenges our attention and demands full investigation. Twenty-one thousand dollars ($21,000) looks much larger to the ordinary man than 1¼ per cent.

Careful and exhaustive discussions in the opinions of our courts analyzing decimal fractions, will be somewhat of a departure from our legal literature of the past; and yet the com-

mercial demands of modern business are actually forcing that very situation upon courts and commissions.

In a property fairly worth two hundred millions of dollars, a variation amounting to fifty million dollars in the appraisal is no greater hardship on any interested party than a variation of 1½ per cent in the fair rate of return. It is so much easier to discuss and reason concerning sums of money aggregating several millions of dollars than it is to analyze and discuss differences of a fraction of 1 per cent, that the ordinary man fails to give proper consideration to the latter, and yet it is of equal consequence with the former.

We may have preconceived notions of what is a reasonable rate of return on investments, which appeals to us as being a part of the common knowledge of men, and yet a careful analysis of how we arrived at those conclusions will show that they are the result largely of our own personal experiences.

The man who comes from the ordinary walks of life is incompetent to determine from his own experience what is a reasonable rate of return on large investments.

If we have not been accustomed to negotiations for the purchase and sale of properties aggregating ten and fifty million dollars in value, it is impossible for us to form a rational and just idea of what is a reasonable rate on such investments. Our judgments are dwarfed and twisted by our own petty investments of the past, and those made by our own immediate circle of relatives and friends. Each one of us has some sort of a standard of what appeals to us as reasonable, but that standard is the creation of our own past lives and experiences.

We must consult those who are making this class of investments.

There are two places to go for knowledge as to what is a reasonable rate; one is to go directly to the financiers who have marketed large blocks of such securities during recent years; the other is to examine the records of actual prices paid and returns earned upon investments in some well established railway companies.

Financiers Handling Large Investments

We must go to those men who are handling this class of investments, in order to find what is a reasonable rate of return. The only witness of this character who took the stand in these cases, was Mr. Hill (Great Northern Record, pages 1320 et seq.), and he gave no testimony upon this subject. His evidence was devoted to a general comparison of the hazards of the railroad business with other industries, and he made no statement as to what was the ordinary rate of return upon investments in these other enterprises, or what was the ordinary rate of return to investors in railway securities. It is easy for us to frame a somewhat true statement of the necessary elements going to make a reasonable rate, but as yet practically no court or commission has undertaken the laborious task of analyzing and applying that standard to the actual facts.

Actual Returns upon Investments.

The *pure money rate* accepted by investors generally as reasonable is best illustrated by the average yield upon investments in representative government bonds. This class of investment commands a low rate of return because there is substantially no hazard involved. The following table shows these rates upon United States, English, French and German bonds; this is taken from a table showing the "real interest earned upon European—government bonds at their average market price," published in Andrew's *Statistics for the United States,* one of the reports of the National Monetary Commission (Senate Document No. 570, 61st Cong. 2d Sess. p. 281). The yield on the European bonds was taken by Andrews from Materialien zur Beurteilung der Zusammenhange Zwischen dem oeffentlichen Schuldenwesen und dem Kapital-markte (Berlin 1908). This and the following table is taken from a publication by W. C. Mitchell of the University of California, entitled: "Rates of Interest and the Prices of Investment Securities, 1890-1909."

ACTUAL RATES OF INTEREST YIELDED BY INVESTMENTS IN BONDS OF THE AMERICAN, BRITISH, FRENCH AND GERMAN GOVERNMENTS.

	U. S. 4's of 1907 and 1925	English Consols 2½ and 2¼%	French Rentes 3%	German 3's
1890	2.43	2.86	3.32	3.45
1891	2.65	2.88	3.19	3.52
1892	2.80	2.85	3.09	3.48
1893	3.04	2.81	3.10	3.48
1894	2.79	2.73	3.01	3.31
1895	2.89	2.60	2.95	3.03
1896	3.14	2.49	2.95	3.02
1897	2.73	2.45	2.91	3.07
1898	2.69	2.49	2.93	3.14
1899	2.47	2.57	2.97	3.31
1900	2.18	2.77	2.99	3.46
1901	1.97	2.93	2.98	3.36
1902	1.98	2.92	2.99	3.25
1903	1.99	2.82	3.07	3.28
1904	2.09	2.84	3.09	3.33
1905	2.00	2.79	3.04	3.33
1906	2.04	2.84	3.08	3.42
1907	2.18	2.98	3.18	3.57
1908	2.44	2.91	3.13	3.62
1909	2.52	2.98	3.09	3.54

For the purposes of the following table, Mr. Mitchell selected ten typical railway companies. The steady similarity in the rates of return upon investments in the bonds of well established companies in similar territory, is very striking; for instance, compare the rates of return on the bonds of the Chicago, Burlington & Quincy R. R. Co., and those of the Chicago, Milwaukee & St. Paul Ry. Co., during the past ten years.

ACTUAL RATES OF INTEREST YIELDED BY INVESTMENTS IN TEN AMERICAN RAILWAY BONDS BY YEARS, 1890-1909:

	% C. & E. I.	% M., K. & T.	% Wabash	% C. & O.	% C., St. P., M. & O.	% C., B. & Q.	% C. R. R. of N. J.	% C., M. & St. P.	% N. Y., C. & St. L.	% W. S. R. R.
1890	5.24	5.20	4.99	5.09	4.96	4.53	4.55	4.39	4.38	3.88
1891	5.28	5.25	5.06	5.11	5.06	4.92	4.61	4.79	4.42	3.96
1892	5.03	5.04	4.81	4.85	4.84	4.73	4.53	4.49	4.18	3.90
1893	5.16	5.17	4.95	5.00	4.97	4.94	4.60	4.42	4.30	4.02
1894	5.14	5.04	4.83	4.75	4.63	4.72	4.40	4.46	4.04	3.87
1895	5.07	4.76	4.72	4.59	4.56	4.64	4.36	4.38	3.87	3.82
1896	5.12	4.92	4.80	4.72	4.65	4.80	4.34	4.28	3.89	3.85
1897	5.02	4.78	4.76	4.48	4.28	4.51	4.47	3.96	3.78	3.72
1898	4.71	4.57	4.54	4.29	4.12	4.07	4.46	3.83	3.80	3.69
1899	4.32	4.34	4.26	4.12	3.97	3.47	4.23	3.59	3.71	3.56
1900	4.27	4.40	4.20	4.12	4.09	3.42	4.07	3.61	3.71	3.57
1901	3.90	4.11	4.08	4.00	3.83	3.40	3.81	3.59	3.66	3.54
1902	3.84	4.05	4.07	4.01	3.81	3.50	3.63	3.51	3.73	3.55
1903	4.15	4.13	4.24	4.19	4.09	3.69	3.84	3.70	3.89	3.70
1904	4.10	4.06	4.15	4.12	4.03	3.72	3.78	3.68	3.83	3.72
1905	3.95	3.97	4.08	4.04	3.79	3.61	3.69	3.59	3.79	3.70
1906	4.06	4.03	4.24	4.10	3.97	3.78	3.89	3.71	3.82	3.80
1907	4.44	4.24	4.60	4.45	4.27	4.08	4.11	3.95	4.07	3.97
1908	4.33	4.15	4.63	4.32	4.18	4.04	4.04	3.93	4.04	3.95
1909	4.14	4.01	4.24	4.13	3.95	3.94	3.89	3.87	3.94	3.89

The foregoing rates of return are not the average on the face value of the security, but the actual yield, computed from the annual return and the actual price the investing public pays for such securities. The method of making the computation is described in the language of Mr. Mitchell, as follows:

"The lowest and highest prices of these bonds in each month of 1890-1909 were obtained from the Financial Review. The means between these extreme quotations were struck, after accrued interest, as of the middle of the month, had been deducted. Then net yields were computed for each month from these mean quotations by the aid of bond tables."

DESCRIPTION OF THE RAILWAY BONDS INCLUDED IN THE FOREGOING TABLE.

Name of Railway	Name of Bonds	Medium of Payment	Dates of		Amount of Issue in Millions of Dollars			Rate of Interest
			Issue	Maturity	Authorized	Outstanding		
						1890	1909	
Chicago & Eastern Illinois	General consolidated and first mortgage		1887	1937	30	4	20	5
Missouri, Kansas & Texas	First mortg...	Gold	1890	1990	40	39	40	4
Wabash	First mortg...	Gold	1889	1939	34	23	34	5
Chesapeake and Ohio.	First consolidated mortg.	Gold	1889	1939	30	22	28	5
Chicago, St. Paul, Minneapolis & Omaha..	Consolidated mortg.		1880	1930	30	13	16	6
Chicago, Burlington & Quincy	Nebraska extension bonds secured by deposit of first mortgage bonds of Nebraska branch roads		1887	1927	*	25	23	4
Central Railroad of New Jersey	General mortgage	Gold	1887	1987	50	35	45	5
Chicago, Milwaukee & St. Paul	General mortgage "Series A"	Gold	1889	1989	150	9	49	4
New York, Chicago & St. Louis	First mortg...	Gold	1887	1937	20	20	19	4
West Shore Railroad.	First mortgage guaranteed by the New York Central		1885	2361	50	50	50	4

*$20,000 per mile.

The foregoing table and all others covering a period of years, conclusively show that the judgment of the permanent investor as evidenced by the records of the market place is stable and not subject to violent fluctuations.

The average rates of interest paid on all railway bonds in America and Great Britain during the last ten years, for which comparative figures were available, are as follows:

RATE OF INTEREST.

	U. S. Funded Debt	England and Wales Loans and Debenture	Scotland Loans and Debt	Ireland Loans and Debt
1899	4.55	3.43	3.57	3.99
1900	4.48	3.43	3.56	4.03
1901	4.45	3.43	3.56	3.99
1902	4.49	3.42	3.55	3.98
1903	4.40	3.42	3.55	3.81
1904	4.33	3.39	3.55	3.80
1905	4.28	3.39	3.56	3.80
1906	4.15	3.39	3.56	3.78
1907	3.94	3.39	3.56	3.77
1908	3.92	3.40	3.56	3.81

(Authorities: Data for Great Britain are copied from "Railway Returns of the Railway Companies of Great Britain for the year 1908 (Pursuant to the Act 34 and 35 Vict. cap. 78), presented to Both Houses of Parliament by command of His Majesty. London, 1909." Data for the United States are compiled from the statistics given in the reports of the Interstate Commerce Commission.)

It was truly stated to this Court by Messrs. Whitney and Coleman, counsel for the New York Public Service Commission, in the case of *Willcox v. Consolidated Gas Co.* of New York, that:

"All corporate profits over and above the average rate of interest upon loans on safe security—say 3½ per cent plus taxes—represent insurance against the risks of the business in which the corporation is engaged. If the business is an old, well established and reputably safe one, the margin between that average rate of interest and the corporate profit tends to become low if the business is competitive. Riskier businesses call for proportionately higher rates of profit."

The rate of return demanded by the investor in railway securities varies somewhat with the locality and the character of

the property; but on all well established properties there is a remarkable sameness in the rate acceptable to investors, regardless of locality or company.

If you desired to find out what the investing public considered to be a reasonable rate of return upon an investment in Northern Pacific stocks or bonds, an easy way to learn this fact would be to go out and buy some of these securities, and then compare the price you had to pay with the average dividends during the past few years. The price you would be compelled to pay would be controlled by the prices on the market place. The stock exchange in New York is the great clearing house for the investors of the country. The records of the sales of stocks and bonds during the past years registers the judgment of what those who have the money to make this class of investments consider reasonable, in view of the ordinary annual return those stocks and bonds are expected to yield. Here you have the testimony of the brainiest men of the country upon the question of what is a reasonable rate of return upon this class of securities. If your standard is such a rate as will attract investments, then you have that test fully answered by the records on the stock exchange.

The peculiar hazards of the railroad business, compared to other industries, are all registered here, all factors are crystallized in the market prices of such securities.

The speculator is here trying to guess what the permanent investor is going to do. Violent fluctuations in prices occur from time to time. All such factors as that must be cared for by taking a large number of typical stocks over an extended period of time. This method removes the effect of extremes; and you thereby secure the sober judgment of the actual investor. It is unfair to take just one or two properties, for there may be exceptional circumstances in their conditions which would not justify any conclusions as to what is the ordinary rate of return demanded by the investing public.

The value of the actual investor's judgment upon this subject has been well stated by Mr. William J. Meyers (formerly connected with the New York Public Service Commission, now

statistician for the Interstate Commerce Commission), in the following language:

"It is, of course, needless to point out that when an investor purchases stock under conditions which lead him to believe that he may reasonably expect it to pay him dividends, amounting nominally to, say, 6 per cent per annum, and pays for such stock 50 points above par, he thereby says in the most unequivocal manner that, under all the circumstances of the case, he is willing to accept 4 per cent per annum as a fair rate of return on his investment. This statement does not apply in the same degree to the price paid by the speculator who buys in order that he may sell again when the market rises. But even this buying and selling on the part of the speculator would clearly be impracticable if, in the long run, his judgment as to the course of the market were not in harmony with the judgment of the permanent investor. The permanent investor is the man from whom the capital ultimately comes, and in the last analysis the rate of return which he is willing to accept controls and determines the price of securities.

"An inquiry regarding the rates of return on railway properties can therefore have no other proper basis than the market prices which the owners of capital are willing to give and to receive when they buy and sell their interests in such properties; and these prices, while they may be modified temporarily by the artificial influences and devices of the speculator, in the long run, rest on the matured judgment of the investor. The good faith of the investor in pronouncing this judgment is attested by the fact that in so doing he parts with his money, which seems to be the most unequivocal proof of sincerity which most men are capable of furnishing." (The foregoing is an extract from Bulletin of the Census Department described below.)

In Bulletin 21 of the Department of Commerce and Labor, Bureau of the Census, Mr. Meyers has given an exhaustive presentation of this subject. The statistics are compiled from the daily records of the Wall Street Journal, and the New York Commercial and Financial Chronicle. Proper allowances

are made for surplus earnings, anticipated dividends, etc. We will not burden this brief with an exhaustive statement of methods in detail followed by Mr. Meyers, or the extended statistics compiled by him for the U. S. Census; these can be obtained by reference to the publication of the U. S. Census Department described above. In view of the entire absence of actual facts in this record upon which to base an opinion as to what is a reasonable rate of return upon this class of securities, and relying upon the doctrines of judicial presumption as stated in the cases above, also the fact that courts will take judicial notice of important facts of general interest disclosed by the official census taken under federal authority, we desire to present a portion of Mr. Meyers' figures showing the market prices, amounts of dividend, and rates of return accepted as reasonable by the investing public generally. Mr. Meyers used in the following table the average market prices over a period of six months. We give below the average rates of return to the investor on all railroads covered by Mr. Meyers' figures, which are located in whole or in part in Group VI as the territory in the United States has been divided by the Interstate Commerce Commission. (Group VI includes the states of Wisconsin, Illinois, Minnesota, Iowa and those parts of Missouri, North Dakota and South Dakota, which are north and east of the Missouri river.

TABLE SHOWING VARIOUS PER CENTUM PRICES OF CERTAIN RAILWAY SECURITIES AND THE VALUES AND CORRESPONDING RATES OF ANNUAL RETURN THEREON, AS OF JUNE 30, 1904.

(Taken from Bulletin 21 of the Department of Commerce and Labor of the United States Census.)

Stocks.

Abbreviated Title or Description of Security	Kind of Stock	Annual Rate Per Cent.	Market Price Straight Average	Rate per cent. of Annual Return to Investor
Atchison, Topeka & Santa Fe....	Com.	4	68.90	5.805
Atchison, Topeka & Santa Fe....	Pref.	5	90.71	5.510
Atlantic Coast Line R. R.....	Com.	5	107.18	4.664
Baltimore & Ohio	Com.	4	78.14	5.121
Baltimore & Ohio	Pref.	4	89.34	4.477
Chicago & Alton	Com.		37.45	
Chicago & Alton	Pref.	4	80.20	4.988
Chicago, Burlington & Quincy....		7	181.22	3.863
Chicago, & Eastern Illinois.....	Pref.	6	125.97	4.764
Chicago Great Western	4% deb	4	84.33	4.745
Chicago Great Western	5% Pref A...	5	63.91	7.825
Chicago, Indianapolis & Louisville	Pref.	4	75.35	5.309
Chicago, Milwaukee & St. Paul...	Com.	7	141.10	4.961
Chicago, Milwaukee & St. Paul...	Pref.	7	174.39	4.014
Chicago & Northwestern	Com.	7	166.34	4.208
Chicago & Northwestern	Pref.	8	211.69	3.779
Chicago, Rock Island & Pacific...		8	133.58	5.990
Chicago, St. Paul, Minneapolis & Omaha	Com.	6	141.16	4.251
Cleveland, Cincinnati, Chicago & St. Louis	Com.	4	74.27	5.384
Cleveland, Cincinnati, Chicago & St. Louis	Pref.	5	104.94	4.766
Des Moines & Ft. Dodge.....	Pref.	7	116.70	5.998
Great Northern	Pref.	7	174.76	4.005
Green Bay & Western	Deb. Ctfs. A..	4	74.20	5.391
Illinois Central		6	128.36	4.673
Illinois Central Leased Lines.....	4% Stock ...	4	103.61	3.861
Keokuk & Des Moines	Pref.	3½	49.22	7.114
Lake Erie & Western	Pref.	3	90.74	3.308
Minneapolis & St. Louis	Com.	2½	53.95	4.634
Minneapolis & St. Louis	Pref.	5	90.09	5.549
Minneapolis, St. Paul & Sault St. Marie	Com.	4	61.67	6.483
Minneapolis, St. Paul & Sault St. Marie	Pref.	7	119.17	5.874
Missouri Pacific		5	90.17	5.543
Pittsburg, Cincinnati, Chicago & St. Louis	Com.	3	59.81	5.013
Pittsburg, Cincinnati, Chicago & St. Louis	Pref.	4	93.02	4.298
Chicago & Eastern Illinois.....	Stk. tr. ctfs..	6	155.79	3.851
Chicago & Eastern Illinois.....	Pref. Stk. tr. ctfs.	6	121.45	4.940

Boston Stock Exchange.

Abbreviated Title or Description of Security	Kind of Stock	Annual Rate Per Cent.	Market Price Straight Average	Rate per cent. of Annual Return to Investor
Atchison, Topeka & Santa Fe....	Com.	4	68.63	5.827
Atchison, Topeka & Santa Fe....	Pref.	5	90.37	5.531
Chicago Jct. Ry. & Union Stock Yards	Com.	8	140.12	5.710
Chicago Jct. Ry. & Union Stock Yards	Pref.	6	119.24	5.034
Union Pacific	Com.	4	81.00	4.938
Union Pacific	Pref.	4	89.47	4.469

Bonds.

Abbreviated Title or Description of Security	Date of Maturity of Bond	Annual Rate and Dates of Payment of Interest			Market Price Straight Average	Corresponding Rate of Annual Return to Investor
Atchison, Topeka & Santa Fe, gen. g. 4s	O.	1,'95	4	A.-O.	99.36	4.027
Adjustment, gold 4s.....	Jl.	1,'95	4	Nov.	88.33	4.541
Adjustment, gold 4s stamped...	Jl.	1,'95	4	M.-N	88.44	4.533
Debenture 4s, Series D.....	F.	1,'06	4	F.-A.	98.10	5.267
Debenture 4s, Series F.....	F.	1,'08	4	F.-A.	96.67	5.012
Eastern Oklahoma Div., 1st g. 4s	Mh.	1,'28	4	M.-S.	93.21	4.465
Atlantic Coast Line, 1st g. 4s.....	Jl.	1,'52	4	M.-S.	92.75	4.362
Savannah, Fla. & Wn., 1st g. 5s.	Ap.	1,'34	5	A.-O.	111.02	4.339
Alabama Midland, 1st gu. g. 5s.	N.	1,'28	5	M.-N.	108.50	4.426
Baltimore & Ohio, prior lien g. 3½s	Jl.	1,'25	3½	J.-J.	93.58	3.955
Gold 4s	Jl.	1,'48	4	A.-O.	100.28	3.986
Convertible debenture 4s.....	Mh.	1,'11	4	M.-S.	96.50	4.616
Pittsburg Junc. & M. D., 1st g. 3½s	N.	1,'25	3½	M.-N.	88.05	4.367
Pittsburg, L. E. & W. Va. Sys., ref. 4s	N.	1,'41	4	M.-N.	94.06	4.320
S. W. Div., 1st g. 3½s.....	Ja.	1,'25	3½	J.-J.	88.51	4.337
Mon. R., 1st gu. g. 5s	F.	1,'19	5	F.-A.	105.00	4.528
C. O. Reorg., 1st. con., g. 4½s..	S.	1,'30	4½	M.-S.	106.88	4.069
Pitts., Cleve. & Tol., 1st 6s.....	O.	1,'22	6	A.-O.	118.60	4.496
Pitts. & Wn., 1st g. 4s.....	Jl.	1,'17	4	J.-J.	96.34	4.371
Central Branch Union Pacific, 1st g. 4s	Je.	1,'48	4	J.-D.	90.79	4.484
Chicago & Alton R. R., ref. g. 3s..	O.	1,'49	3	A.-O.	82.36	3.840
Same Ry., gold 3½s.....	Jl.	1,'50	3½	J.-J.	76.06	4.795

Bonds—Continued.

Abbreviated Title or Description of Security	Date of Maturity of Bond	Annual Rate and Dates of Payment of Interest	Market Price Straight Average	Corresponding Rate of Annual Return to Investor
Chicago, Burlington & Quincy, Denver Div., 4s	F. 1,'22	4 F.-A.	99.28	4.056
Illinois Div., 3½s	Jl. 1,'49	3½ J.-J.	91.79	3.890
Iowa Div. sink fd., 5s	O. 1,'19	5 A.-O.	109.41	4.161
Same 4s	O. 1,'19	4 A.-O.	100.59	3.948
Nebraska Extension 4s	My. 1,'27	4 M.-N.	103.97	3.738
Southwestern Div., 4s	S. 1,'21	4 M.-S.	98.80	4.098
Debenture 5s	My. 1,'13	5 M.-N.	104.51	4.373
Han. & St. Jo., con. 6s	Mh. 1,'11	6 M.-S.	113.11	3.760
Chicago & Eastern Illinois, 1st s. f. cur. 6s	D. 1,'07	6 J.-D.	105.61	4.244
1st con. g. 6s	O. 1,'34	6 A.-O.	128.82	4.290
Gen. con. 1st 5s	N. 1,'37	5 M.-N.	115.10	4.159
Chic. & Ind. Coal Ry., 1st 5s	Ja. 1,'36	5 J.-J.	112.48	4.274
Chicago, Ind., & Louisville, ref. g. 6s	Jl. 1,'47	6 J.-J.	126.92	4.562
Lou., N. A. & Chic., 1st 6s	Jl. 1,'10	6 J.-J.	107.70	4.520
Chicago, Milwaukee & St. Paul, con., 7s	Jl. 1,'05	7 J.-J.	170.45	4.107
Terminal gold 5s	Jl. 1,'14	5 J.-J.	108.34	3.980
Gen. g. 4s, Series A	My. 1,'89	4 J.-J.	107.65	3.704
Gen. g. 3½s, Series B	My. 1,'89	3½ J.-J.	97.20	3.606
Ch. & Mo. Riv. Div., 5s	Jl. 1,'26	5 J.-J.	115.84	3.922
Chic. & Pacific Div., 6s	Ja. 1,'10	6 J.-J.	109.75	4.008
Chic. & P. W., 1st g. 5s	Ja. 1,'21	5 J.-J.	114.37	3.816
Dak. & Gt. So., g. 5s	Ja. 1,'16	5 J.-J.	109.40	3.974
1st Hast. & D. Div., 7s	Ja. 1,'10	7 J.-J.	116.32	3.689
Same, 5s	Ja. 1,'10	5 J.-J.	105.37	3.910
1st I. & D. Exten., 7s	Jl 1,'08	7 J.-J.	167.58	4.176
Mineral Point Div., 5s	Jl. 1,'10	5 J.-J.	105.49	3.961
1st So. Minn. Div. os	Ja. 1,'10	6 J.-J.	110.06	3.940
1st Southwest Div., 6s	Jl. 1,'09	6 J.-J.	109.25	3.944
Wis. & Minn. Div., g. 5s	Jl. 1,'21	5 J.-J.	113.49	3.906
Mil. & No., 1st M. L., 6s	Je. 1,'10	6 J.-D.	110.58	3.974
1st consol., 6s	Je. 1,'13	6 J.-D.	114.33	4.071
Chicago & Northwestern consol., 7s	F. 1,'15	7 Q.-F.	128.33	3.737
Extension, 4s	Au. 1,'26	4 F.-A.	103.12	3.791
General, g. 3½s	N. 1,'87	3½ M.-N.	97.30	3.603
Sinking fund, 6s	O. 1,'29	6 A.-O.	111.18	5.199
Same, 5s	O. 1,'29	5 A.-O.	108.32	4.450
Debenture, 5s, 1909	N. 1,'09	5 M.-N.	103.57	4.238
Same 1921	Ap. 1,'21	5 A.-O.	107.17	4.393
Sinking fund deb., 5s	My. 1,'33	5 M.-N.	115.27	4.091
Northern Illinois, 1st 5s	Mh. 1,'10	5 M.-S.	104.34	4.130
Winona & St. Pet., 2d 7s	N. 1,'07	7 M.-N.	109.17	4.150
Mil. L. S. & West., 1st g. 6s	My. 1,'21	6 M.-N.	126.81	3.826
Ext. & Imp., s. f. g. 5s	F. 1,'29	5 F.-A.	117.03	3.914
Conv., deb., 5s	F. 1,'07	5 F.-A.	102.11	4.203

Bonds—Continued.

Abbreviated Title or Description of Security	Date of Maturity of Bond		Annual Rate and Dates of Payment of Interest		Market Price Straight Average	Corresponding Rate of Annual Return to Investor
Chicago, Rock Island & Pacific, 6s.	Jl.	1,'17	6	J.-J.	121.19	3.910
Geni., gold 4s	Ja.	1,'88	4	J.-J.	102.12	3.913
Collat., trust, 4s, Series M.	My.	1,'15	4	M.-N.	95.81	4.494
Same, Series N.	My.	1,'16	4	M.-N.	92.74	4.811
Same, Series P.	My.	1,'18	4	M.-N.	89.89	5.022
C., R. I. & Pac. R. R., 4s.	N.	1,2002	4	M.-N.	68.82	6.490
Collat. trust, g. 5s.	S.	1,'13	5	M.-S.	78.00	8.497
B., C. R. & No., 1st 5s.	Je.	1,'06	5	J.-D.	101.24	4.342
Cons. 1st, & Col. tr. g. 5s.	Ap.	1,'34	5	A.-O.	115.65	4.086
C. R. I. F. & N. W., 1st 5s.	O.	1,'21	5	A.-O.	109.58	4.212
Choc. Okl. & G., gen. g. 5s.	O.	1,'19	5	J.-J.	104.28	4.605
1st consol., g. 5s.	My.	1,'52	5	M.-N.	102.99	4.839
Des M. & Ft. D., extension 4s.	Ja.	1,'05	4	J.-J.	95.80	8.469
Keokuk & Des Moines, 1st 5s.	O.	1,'23	5	A.-O.	104.71	4.628
Chicago, St. Paul, Minneapolis & Omaha, con., 6s.	Je.	1,'30	6	J.-D.	130.15	4.100
Ch., St. P. & Minn., 1st 6s.	My.	1,'18	6	M.-N.	129.26	3.342
North Wisconsin, 1st 6s.	Ja.	1,'30	6	J.-J.	128.77	4.160
St. Paul & S. City, 1st g. 6s.	Ap.	1,'19	6	A.-O.	120.75	4.110
Chicago Terminal transfer, g. 4s.	Jl.	1,'47	4	J.-J.	77.60	5.334
Chicago & Western Indiana, gen. g. 6s	D.	1,'32	6	Q.-M.	110.26	5.298
Cincinnati, Hamilton & D.—Cin. D. & I., 1st gu. g. 5s.	My.	1,'41	5	M.-N.	111.44	4.372
Cin., Ind. & W., 1st gu. g. 4s.	Ja.	1,'53	4	J.-J.	97.51	4.120
Cleveland, Cincinnati, Chicago & St. L., gen. gold 4s.	Je.	1,'93	4	J.-D.	98.06	4.080
Cairo Div., 1st g. 4s.	Ja.	1,'39	4	J.-J.	99.29	4.038
Cin. W. & M. Div., 1st g. 4s.	Jl.	1,'91	4	J.-J.	97.65	4.099
St. Louis Div., 1st col. tr. g. 4s.	N.	1,'90	4	M.-N.	100.16	3.994
Cin., I., St. Louis & C., cons. 6s.	My.	1,'20	6	M.-N.	108.70	5.643
1st gold, 4s.	Au.	1,'36	4	Q.-F.	101.10	3.940
Cin. S. & Cleve., con., 1st g. 5s.	Ja.	1,'28	5	J.-J.	110.87	4.265
Cl. C. C. & Ind., gen. con., g. 6s.	Ja.	1,'34	6	J.-J.	126.79	4.374
Peoria & Eastern, 1st con., 4s.	Ap.	1,'40	4	A.-O.	95.71	4.232
Income 4s	Ap.	1,'90	4	Apr.	59.50	6.870
Elgin, Joliet & Eastern, 1st g. 5s.	My.	1,'41	5	M.-N.	113.31	4.277
Evansville & Terre Haute, 1st con. g. 6s	Jl.	1,'21	6	J.-J.	116.04	4.627
1st gen. g. 5s.	Ap.	1,'42	5	A.-O.	101.80	4.894
Evansville & Indianapolis, 1st con. gu. g. 6s	Ja.	1,'26	6	J.-J.	104.17	5.666
Great Northern—C., B. & Q., col. tr. 4s	Jl.	1,'21	4	J.-J.	92.59	4.634
Illinois Central, 1st g. 4s.	Ja.	1,'51	4	J.-J.	113.38	3.402
1st g. 3½s	Ja.	1,'51	3½	J.-J.	100.20	3.491
Collat. tr. g. 4s.	Ap.	1,'52	4	A.-O.	103.50	3.840
L. N. O. & Texas g. 4s.	N.	1,'53	4	M.-N.	101.66	3.924

Bonds—Continued.

Abbreviated Title or Description of Security	Date of Maturity of Bond	Annual Rate and Dates of Payment of Interest	Market Price Straight Average	Corresponding Rate of Annual Return to Investor
Louisville Div., g. 3½s	Jl. 1,'53	3½ J.-J.	93.52	3.791
St. Louis Div., g. 3s	Jl. 1,'51	3 J.-J.	82.43	3.805
g. 3½s	Jl. 1,'51	3½ J.-J.	92.09	3.866
Western Lines, 1st g. 4s	Au. 1,'51	4 F.-A.	106.11	3.724
Belle & Caron., 1st 6s	Je. 1,'23	6 J.-D.	122.66	4.246
Ch. & St. L. & N. O., g. 5s—reg.	Je. 1,'51	5 J.-D.	117.93	
g. 3½s	Je. 1,'51	3½ J.-D.	91.90	3.876
Iowa Central, 1st g. 5s	Je. 1,'38	5 J.-D.	109.06	4.479
Refunding g. 4s	Mh. 1,'51	4 M.-S.	86.30	4.731
Minneapolis & St. Louis, Pacific Ex., 1st g. 6s	Ap. 1,'21	6 A.-O.	118.01	4.463
1st Consol., g. 5s	N. 1,'34	5 M.-N.	114.18	4.170
1st and refund, g. 4s	Mh. 1,'49	4 M.-S.	95.32	4.235
Mobile & Ohio, new gold 6s	D. 1,'27	6 J.-D.	123.58	4.379
1st extension, 6s	Jl. 1,'27	6 Q.-J.	125.20	4.269
Gen., 4s	S. 1,'38	4 M.-S.	91.87	4.468
Montgom. Div., 1st g. 5s	F. 1,'47	5 F.-A.	111.87	4.381
St. L. & C., Coll. tr. g. 4s	My. 1,'30	4 Q.-F.	89.22	4.725
Northern Pacific, prior lien, g. 4s	Ja. 1,'97	4 Q.-J.	102.89	3.886
gen. lien, g. 3s	Ja. 1,2047	3 Q.-F.	71.66	4.189
St. Paul-Duluth Div., g. 4s	D. 1,'96	4 J.-D.	97.16	4.121
St. Paul & North. Pacific, gen. g. 6s	F. 1,'23	6 F.-A.	121.64	4.297
St. Paul & Duluth, 2d 5s	O. 1,'17	5 A.-O.	106.07	4.388
Wash. Cent. Ry., 1st g. 4s	Mh. 1,'48	4 Q.-M.	84.30	4.872
Northern Pacific Terminal Co., 1st g. 6s	Ja. 1,'33	6 J.-J.	111.02	5.248
Peoria & Pekin Union, 1st g. 6s	F. 1,'21	6 Q.-F.	121.09	4.218
2d g. 4½s	F. 1,'21	4¼ M.-N.	97.36	4.732
St. Paul, Minneapolis, & Manitoba, 2d 6s	O. 1,'09	6 A.-O.	108.04	4.270
1st consol. 6s	Jl. 1,'33	6 J.-J.	130.02	4.198
Reduced to g. 4½s	Jl. 1,'33	4½ J.-J.	107.32	4.066
Dakota exten., g. 6s	N. 1,'10	6 M.-N.	108.79	4.393
Montana exten., 1st g. 4s	Je. 1,'37	4 J.-D.	100.26	3.986
Montana C., 1st gu. g. 6s	Jl. 1,'37	6 J.-J.	132.52	4.176
1st gu. g. 5s	Jl. 1,'37	5 J.-J.	115.02	4.158
Will. & S. F., 1st g. 5s	Je. 1,'38	5 J.-D.	116.42	4.100
Southern Railway Co., 1st con., g. 5s	Jl. 1,'94	5 J.-J.	112.62	4.429
Mobile & O., coll. tr. g. 4s	S. 1,'38	4 M.-S.	93.63	4.362
St. Louis Div., 1st g. 4s	Ja. 1,'51	4 J.-J.	93.46	4.326
Ala. Cent. Ry., 1st 6s	Jl. 1,'18	6 J.-J.	114.52	4.585
Atl. & Danv., 1st gold 4s	Jl. 1,'48	4 J.-J.	92.04	4.411
Col. & Greenville, 1st 6s	Ja. 1,'16	6 J.-J.	115.87	4.244
E. T., & Va. Ga. Div., g. 5s	Jl. 1,'30	5 J.-J.	112.27	4.220
Con., 1st g. 5s	N. 1,'56	5 M.-N.	116.95	4.199
E. Tenn., reor., lien G. 4-5s	Mh. 1,'38	5 M.-S.	109.39	4.461

Bonds—Continued.

Abbreviated Title or Description of Security	Date of Maturity of Bond	Annual Rate and Dates of Payment of Interest		Market Price Straight Average	Corresponding Rate of Annual Return to Investor
Georgia Pacific Ry., 1st g. 6s	Ja. 1,'22	6	J.-J.	119.99	4.059
Knox & Ohio, 1st g. 6s	Jl. 1,'25	6	J.-J.	119.84	4.526
Rich. & Dan., con. g. 6s	Ja. 1,'15	6	J.-J.	113.55	4.377
Debenture 5s stamped	Ap. 1,'27	5	A.-O.	109.18	4.358
So. Car. & Georgia, 1st g. 5s	My. 1,'19	5	M.-N.	103.50	4.668
Va. Mid., serial—Series A, 6s	Mh. 1,'06	6	M.-S.	102.54	4.595
Series D, 4-5s	Mh. 1,'21	5	M.-S.	108.36	4.293
Va. Mid., gen. 5s	My. 1,'36	5	M.-N.	110.28	4.398
W. O. & W., 1st cur. gu. 4s	F. 1,'24	4	F.-A.	91.35	4.680
West. N. C., 1st con. g. 6s	Jl. 1,'14	6	J.-J.	112.86	4.392
Terminal Association of St. Louis, 1st g. 4½s	O. 1,'39	4½	A.-O.	112.34	3.856
1st con. g. 5s	Au. 1,'44	5	F.-A.	113.16	4.308
St. L. M. Bridge Ter., gu. g. 5s	O. 1,'30	5	A.-O.	107.03	4.537
Toledo, Peoria & Western, 1st gold 4s	Jl. 1,'17	4	J.-J.	87.80	5.312
Toledo, St. L. & Western, prior lien g. 3½s	Jl. 1,'25	3½	J.-J.	82.42	4.841
Fifty-year gold 4s	Ap. 1,'50	4	A.-O.	69.21	5.971
Wabash, 1st g. 5s	My. 1,'39	5	M.-N.	114.71	4.191
2d gold 5s	F. 1,'39	5	F.-A.	106.60	4.616
Debenture, series A, 6s	Jl. 1,'39	6	J.-J.	91.18	6.653
Same, series B, 6s	Jl. 1,'39	6	J.-J.	59.45	10.307
1st lien equip., s. f. g. 5s	Mh. 1,'21	5	M.-S.	100.18	4.982
1st g., 5s Det. & Chi. Ex	Jl. 1,'41	5	J.-J.	106.93	4.610
Des Moines Div., 1st g. 4s	Ja. 1,'39	4	J.-J.	89.42	4.617
Omaha Div., 1st g. 3½s	O. 1,'41	3½	A.-O.	80.61	4.592
Wisconsin Central, 1st gen. g. 4s	Jl. 1,'49	4	J.-J.	88.85	4.585

TABLE OF ABBREVIATIONS.

Kind of Stock.—Com. denotes common; deb., debenture; guar., guaranteed; pref., preferred; stk. tr. ctfs., stock trust certificates; vot. tr. ctfs., voting trust certificates.

Annual rate and dates.—J.-J. denotes January and July; F.-A., February and August; M.-S., March and September; A.-O., April and October; M.-N., May and November, and J.-D., June and December. QJ denotes Quarterly beginning in January; QF, Quarterly beginning in February, and QM, Quarterly beginning in March. Where the date is other than the 1st, it is denoted by a figure annexed to the symbol for the month, although it should be stated that in the ordinary case

of noncontractual dividends there is more variability in the date of payment of dividends than in that of interest on bonds. In dates of interest payments, Ja. denotes January; F., February; Mh., March; Ap., April; My., May; Je., June; Jl., July; Au., August; S., September; O., October; N., November, and D., December.

Extreme prices, etc.—Prefix b denotes bid; a, ask; x, ex-dividend. All prices shown are sales prices except those having *b* or *a* prefixed, but the prices shown in these four columns are not stripped.

4s, 5s, etc., denote bonds paying interest at 4 per cent per annum, etc., on the face of the bond; 1st, secured by 1st mortgage; col., collateral; con., consolidated; conv., convertible; cur., currency; deb., debenture; ext., extended; g., gold; gen., general; gu., guaranteed; inc., income; int., interest; l. g., land grant; mtg., and mort., mortgage; pur., purchase; rf., and ref., refunding; reg., registered; ry. & ld. gr., railway and land grant; s. f., and sink. fd., sinking fund; ter., terminal; tr., trust.

Mr. Meyers in the same publication gives another series of computations, showing the total rates of return on the entire property from both stocks and bonds, and including in the returns such sums as represent the fair *average amount of the annual undivided gain in the value of the property of each corporation.* In this undivided gain he includes undivided surplus earnings, and betterments and improvements paid for out of earnings. The principal items he uses, stated in his own language, are as follows: "permanent improvements paid for out of current earnings—i. e., charged to income or to operating expense but not to construction or equipment, and the amount of increase in the profit account or of decrease in the loss account." He takes the average of these items during a period of five years.

The consideration of these added items as parts of the return to the investor is technically correct, and yet it is quite doubtful if the permanent investor ordinarily reckons these factors, in computing the worth of a stock, on a par with the annual cash distributions. However, in the long run, these items have a telling effect on the stability of a company's securities, and upon the market price of the same. With these

factors included, Mr. Meyers finds the annual returns on actual investment in the properties of companies in Group VI, described above, as follows:

Atchison, Topeka and Santa Fe	5.172
(C. P.) Duluth, South Shore and Atlantic	4.400
Mineral Range	5.500
(C. P.) Minneapolis, St. Paul & Sault Ste. Marie	5.532
Chicago and Alton	4.095
Chicago and Northwestern	6.394
Chicago, Burlington and Quincy	4.753
Chicago Great Western	4.292
Chicago, Milwaukee and St. Paul	6.184
Chicago, Peoria and St. Louis	5.602
Chicago, Rock Island and Pacific	6.050
Chicago, St. Paul, Minneapolis and Omaha	4.656
Chicago Terminal Transfer	3.750
Des Moines Union	4.904
Duluth and Iron Range	8.318
Duluth, Missabe and Northern	8.784
Elgin, Joliet and Eastern	5.669
Great Northern	5.288
Green Bay and Western	6.386
Iowa Central	4.637
Minneapolis and St. Louis	5.501
Minneapolis Union	5.113
Newton and Northwestern	5.500
Northern Pacific	5.052
Peoria and Pekin Union	5.514
(St. L. & S. F.) Chicago and Eastern Illinois	5.420
Toledo, Peoria and Western	5.621

In the foregoing table there are twenty-seven properties given; of these fourteen, a little over 50 per cent, yield an annual return to the investor of 5½ per cent, or less; the average yield is 5.48 per cent.

In the previous tables showing the rates of return on investments in stocks and bonds, based upon actual cash dividends declared or interest paid, forty-two stocks were quoted. Twenty-three of these stocks, or fifty-four per cent, yield to actual investors less than 5 per cent; the average is 5.01 per cent; 92 per cent of them yield less than 6 per cent. One hundred and seventy-three series of bonds were given in the table; of these one hundred and fifty-six, or 90 per cent, yield

a return to the investor of less than 5 per cent, the average is 4.42 per cent.

While Mr. Meyers used a period of five years to secure the average amount of return, he pursued a different policy in arriving at the fair market price. The market price chosen by Mr. Meyers (which, multiplied by the outstanding capital stock make up the divisor, in computing the *rate* of return) chanced to be at the lowest ebb for any like period since the year 1900. The market prices selected by Mr. Meyers were those during the first six months of the year 1904, during which time stocks generally were twenty per cent lower than during any prior period of six months since the year 1900, and from thirty per cent to forty per cent lower than any subsequent period of six months up to the present time, with the single exception of the fiscal year 1908. The result of this situation is that the quotient (or the "fair rate of return" based upon such a computation) is abnormally high. The reason Mr. Meyers chanced to select these prices is undoubtedly due to the fact that the work happened to be performed in 1904. The average for several ordinary years would be a safer and fairer number to take for such purposes. Making an allowance for the error in the average given above, it is a fair approximation to state that the average rate of return sought by the public, and which it is willing to accept upon this class of investments is from 4½ to 5 per cent. This rate is the crystallization, the residuum of all the factors that enter into problems connected with railway investments, and expenses and profits, for the investor takes those things into consideration. This is no opinion, nor judgment, nor desire as to what the reasonable rate of return should be, but simply a fact that the public itself is willing to accept ordinarily, from 4½ to 5 per cent.

The Government could secure these same funds for three per cent.

In the face of this demonstration as to the rate at which the public is actually willing to invest its money in the securities of railway companies, the finding of Special Master Otis and Judge Sanborn that a return above all operating expenses, all

taxes, all maintenance, repairs and renewals, etc., etc., of less than 7 per cent would be confiscation, is most astounding.

The writers of this brief believe the following three propositions are impregnable, and cannot be successfully controverted:

1st. Legislation which prescribes railroad freight and passenger rates, and which rates after paying all expenses yield to the investor a return equal to that which investors in the securities of companies engaged in similar enterprises are willing to accept, is not confiscatory.

2d. The public today is investing its money in reasonably safe securities, substantially of the same class as those of the Northern Pacific and Great Northern Railway Companies, which yield to the said investors four and one-half to five per cent per annum upon their investments.

3d. Railroad rate legislation that permits a return upon the value of the property of four and one-half per cent per annum is not confiscatory.

In the United States the investing public is placing its money so that it will yield an annual return of approximately from four and one-half to five per cent per annum. This is true of investments in railroad securities, both of stocks and of bonds. This is also true of investments in all other industrial securities of equal grade. It is likewise true of investments in municipal bonds and in bank stocks. The securities of any well established property that are yielding the investor a net return of five per cent or more per annum, and have done so consistently for a number of years, with prospects of yielding substantially the same in the future are selling at a premium, and that premium is based on a four and one-half or five per cent return on the investment.

The holder of railroad stocks receives his return clear. All expense of every nature incident to the management of the business has been paid. He is not burdened with any of the management nor with any of the expense of the business. He invests his money and receives his dividends. He attends the

stockholders' meetings, and that discharges his obligation to his corporation.

The man who loans money and takes a note, secured or otherwise, bearing six, eight or ten per cent interest, looks after the collection of his note, pays the taxes thereon and all expenses incident to keeping up and maintaining the business of loaning money.

One way of determining the value of railroad property is on the net earnings basis. When this basis is used, such a valuation is placed upon the railroad property as will at a given per cent per annum equal the net earnings of the road. Railroads have been bought, sold, and re-organized on the basis of a four and one-half per cent return.

Legislation which permits the investing public to secure the return generally secured by it on other like investments will not be confiscatory. Legislation which attempts to permit a man to secure a rate of return higher than that received by the investing public will fail to accomplish that purpose, but will accomplish another and distinct purpose. Neither legislatures nor courts under present financial conditions can secure to investors in railroad securities a rate of return above that fixed by the financial world, because when a man puts money into property upon the basis of and expecting four or five per cent return or dividend, and by legislative enactments or judicial decrees that return or dividend is increased to seven per cent, he asks and receives an increase of fifty or seventy-five per cent on his investment when he sells his property. He still considers four and one-half or five per cent per annum the true basis of his return, that is his dividend. The value of his investment, or principal, has been increased by that legislation or judicial decree; his dividend has not.

In the Minnesota rate cases Judge Sanborn found that any return of less than seven per cent would be confiscatory. Why seven per cent? Why not ten per cent? The holder of railroad securities, stocks or bonds, yielding seven per cent per annum on their face value, demands and receives a high premium when he sells the same. Why draw the line of confisca-

tion at a rate above what the public is willing to invest its money, dollar for dollar? Why not say that rate legislation which will permit a rate of return to the investor at the rate at which the ordinary investor is willing to invest his money in that class of property cannot be considered confiscatory, and all such legislation which permits that amount of return is valid?

The investor in Minnesota railroad securities does not receive seven per cent on his investment. He invests his money on a basis which yields to him an amount equal to from four and one-half to five per cent per annum on the sum invested. If on the face value of a security a dividend of seven per cent is paid, the purchaser of that security pays such an amount as will make the seven per cent dividend on the security equal to four or five per cent on the amount of money invested. The return on agricultural, manufacturing, mercantile and other industrial pursuits in Minnesota, together with money loaned by banks and by private parties, includes compensation for labor and management. The profits in agriculture are really payments for the labor of the farmer and his wife and children sixteen hours a day. The merchant is occupied during all his waking hours, day and night, with the problems connected with his business. His profits are his returns on his investment and his compensation for his labor. The banker or money lender must secure his compensation for his labor, his time and his investments in property incident to his business out of the interest collected by him for the money loaned. Wherever the individual conducts his business he gives it time, thought and labor without stint, and his returns are largely compensation for that time and thought and labor; and these returns are sometimes large, but often nothing. The well established business in Minnesota that is incorporated and pays dividends to stockholders without time or thought or labor on the part of that stockholder does not pay him seven per cent on the present value of the property. His return on that property does not exceed four or five per cent, above taxes and costs of upkeep with a reasonable depreciation allowance.

The legislation of today regulating the conduct and rates of railroads, designed primarily to protect the public, is resulting in great good to the railroads by preventing ruinous competition, and by steadying rates, both freight and passenger.

The investor himself is probably the shrewdest, fairest, safest witness we have on these issues. He is not trying to win a lawsuit. He backs up his judgment with his money. He is not content with superficial facts, but goes on down to the bottom, with the help of the best brains money can hire. His testimony is not framed up to meet a particular emergency or to carry a certain point, his testimony is recorded in the current reports of the market place, extending back for many years. The circumstances surrounding the market place must be given careful consideration in order to determine the weight to be given such evidence. The speculator is there at all times; his success, however, depends upon his ability to guess what the permanent investor is going to do. That is why actual facts about the earnings of different companies are registered in such an unmistakable manner in the course of the stock market. A company may bury large sums of money in betterments and improvements at a particular time, thereby showing a marvelously depleted net revenue; or it may go to the other extreme and play fast and loose with the property it owns, but at the same time declare fancy dividends and show large net revenues; the stock market hugs closer to the true situation in each case than would any table of statistics about net earnings. Upon the other hand the speculator is constantly endeavoring to manipulate the market, and there is a margin in which his efforts are successful temporarily. The market price of a given security at any given moment is an unsafe index of value, it may be wholly the result of the work of one or a few daring speculators. But experience has demonstrated, to the sorrow of many, how futile it is to go against the current, and how temporary is the reign of the stock manipulator.

Our great financiers seek to learn the true situation about properties, their expenses and earnings and profits, actual and prospective. The trend of prices over a long period of time on a representative list of stocks is fixed by the permanent investor who bases his judgment on the ultimate facts so far as the best human brains can find out what those facts are.

In firm, conclusive terms these men have said in the market places of the country that ordinarily a return ranging from four and one-half to five per cent is a reasonable return upon investments in the properties of well established railroad companies, and they back up this conclusion with their own hard-earned money.

In the entire absence of any competent evidence as to what actual rates of return people receive on investments in this and other similar classes of enterprises in this locality, the Court must either order the cases dismissed for failure of proof by the complainants, or refer them back for the further taking of evidence, or it must take judicial notice of these facts, in accordance with decisions hereinbefore cited, and in accordance with the position taken in the lower court by counsel for the carriers.

PART V.

THE RECORD IS DEFICIENT IN THAT IT FAILS TO SHOW THE VALUE OF THAT PORTION OF THE PROPERTY ACTUALLY USED IN THE CONDUCT OF INTRA-STATE BUSINESS, BUT THE LOWER COURT AND THE MASTER ATTEMPT TO GUESS AT THIS FIGURE ON THE REVENUE BASIS, A BASIS WHICH IS ABSURD IN REASON AND HAS BEEN SPECIFICALLY REPUDIATED BY THIS COURT.

There are many important factors involved in this apportionment of value which are fundamental to the entire case.

This record is entirely lacking in evidence upon which this court can make a just separation of the properties in Minnesota between interstate and intrastate business. A fair consideration of the matter at stake will show conclusively:

A. That the Master, and the lower court have adopted the wrong method for the apportionment of interstate earnings to Minnesota, from which factor the Master determines the portion of the value of the railway properties devoted to interstate business, the remainder of the total value of said properties being entitled to earn a just return from Minnesota intrastate business.

B. That the method of apportionment of value adopted by the lower court compels Minnesota traffic alone to pay a return upon all the property in the state, which includes expensive terminals, added facilities, double tracks, heavy equipment, etc., necessitated solely by the demands of interstate business.

C. That the entire theory of the separation of said values upon the revenue basis, is unlawful, and has been repudiated by this Court. (Page 322.)

(A) That the Master, and the lower court have adopted the wrong method for the apportionment of interstate earnings to

Minnesota from which factor the Master determines the portion of the value of the railway properties devoted to interstate business, the remainder of said properties being entitled to earn a just return from Minnesota intrastate business.

The Master has seen fit to make this division of values devoted to state and interstate business, respectively, upon the revenue basis. Even if that basis were correct, the Master's findings could not be accepted. Upon the basis adopted by the Master, it becomes of first importance to know that the revenues are properly divided.

For the purpose of allocating values according to earnings, it becomes of pre-eminent importance to find out what is the correct method to determine the proportion of earnings on interstate business which should be credited to that portion of the interstate hauls located within the state of Minnesota. If the method which you adopt causes that portion of the revenue credited to Minnesota interstate business to be too small, then the portion of the values of properties, divided upon such a basis, will consequently be too small as to interstate business, leaving that portion of the values earning state revenue too large. What method did the Master adopt in order to find out what portion of the earnings on these interstate hauls should be credited to Minnesota? Nowhere do we find the rule stated in his opinion or in the opinion of the court; we are forced to go to the record to ascertain this vital point. (The mile pro rate basis was adopted; Gt. Nor. Rec., Martin 988, and Parker 705.) We find his method to be as stated above: Upon any given shipment originating in Minnesota and terminating without the state, he divides the earnings upon that shipment in accordance with the miles it is hauled to the state line, as compared to the number of miles hauled without the state; this is called the mile pro rate basis. A concrete illustration of this method is as follows: Suppose a point X in Minnesota is one hundred miles from the state line; there is another point Y, outside the state, five hundred miles from the state line; the total earnings on a shipment from X to Y is $36.00; Otis would credit Minnesota's share of the inter-

state business with six dollars, the remaining thirty being credited outside of the state; that six dollars must pay the cost of haulage, all terminal expenses, taxes, all other operating expenses, and a reasonable return upon the value of the property located in Minnesota and devoted to interstate business. Adding up these factors representing interstate shipments, the Master finds a total revenue credited to Minnesota interstate traffic; as against this revenue, he finds a total revenue earned by Minnesota intrastate traffic; then he finds the total values of the properties located in Minnesota, and divides that total valuation between state and interstate business in the proportion of the two revenue totals just described. The accuracy of the results, consequently, depends entirely upon whether it is proper to divide the total *earnings* on an interstate shipment on the *mile pro rate basis,* independent of the other questions as to whether the state should maintain and pay a return upon facilities required for business outside of the state as well as inside, and the further question whether the revenue basis in itself is fair or not, because of the inequality of factors entering into it, which will be discussed later.

Dividing earnings on the mile pro rate basis is unjust to the people of Minnesota, and is not founded either upon reason or upon the custom of these carriers, whether it is in allocating their own earnings, or in dividing earnings between carriers, the division being made in the latter case by voluntary contract between the said carriers.

We are told that the revenue for interstate business in the State of Minnesota is apportioned to the State as required by the Minnesota Railroad and Warehouse Commission on the equal mile pro rate basis. That this is a fair apportionment, or that the division is in accordance with the contracts and division sheets with their connecting carriers is not shown. It must always be remembered that these railroads run over a long stretch of country, very much diversified in topography, and must of necessity, meet with conditions which are different from the conditions existing in Minnesota, and inquiry

should be made as to whether under these circumstances such division is fair or proper. In this, also, the complainants have failed to take upon themselves the burden of proving their case.

Neither Judge Sanborn, nor the Master, gives the slightest consideration to the question whether the mile pro rate basis is correct for finding the portion of interstate earnings to be credited to Minnesota. There is no effort evidenced in the entire record or in the briefs of counsel to find out whether this is the correct basis. Statistics or computations may be matters of fact, but the selection of the proper methods to ascertain these facts is a legal function. There being absolutely nothing in the record upon this subject, we are compelled to go outside of it in order to gather concrete illustrations bearing upon the question as to what is the correct basis for the division of earnings.

This is another glaring illustration of the deficiency of the record in these cases. Our justification for pursuing this course is the gravity of the issues involved, the tremendous importance to the public that proper methods should be pursued, and the further fact that the conclusions reached by this Court upon these methods in these cases will be largely controlling upon identically similar issues in cases wherein the commissions represented by this committee are involved at the present time.

It is a well known fact, and so universally accepted as true, that it can be considered a matter of common knowledge, that railroads originating traffic are entitled to larger portions of the earnings from such traffic than the main lines carrying the said business to the large commercial centers. A number of years ago, there was a conflict amongst the directors and stockholders of a large railway company in this country, as to the wisdom of pursuing a branch line policy. It was claimed on the one hand, that the board of directors were losing money for the company in purchasing and building branch lines; upon the other hand, it was claimed on behalf of the directors that such a policy was absolutely necessary to the prosperity and

growth of that company. Experts were put to work upon the books of this company; the results of their investigation apparently showed that every branch line on their system was losing them money. Later, an expert from the City of New York was put to work examining the same set of books, and he demonstrated that 60 per cent of all of the business of the said system originated or terminated with the branch lines. He further demonstrated that had it not been for the traffic which these branch lines gave to the system, the main lines would not have been able to have paid operating expenses.

The first set of experts referred to, apportioned the revenues on the *mile pro rate basis*. The results of the work of the New York expert demonstrated the fallacy of that method of apportioning revenues.

One of the complainant companies in this case had precisely the same issue at stake at one time amongst its directors and stockholders; they made a similar investigation, with similar results.

Several concrete illustrations of the falsity of the *mile pro rate* basis for the division of earnings will be given:

1st. From a decision of the Interstate Commerce Commission;

2d. From the report of the Directors of the Northern Pacific Railroad Company to its stockholders in 1893; and

3d. From the freight tariffs and division sheets of the carriers concerned in these cases.

In the case of *Acme Cement & Plaster Co. v. C. & N. W. Ry. Co., et al.*, 18 I. C. C. Rep. 105, the Interstate Commerce Commission recognized the higher portion of a through rate which should go to a branch line than to a main line. In this case the main line was the Union Pacific, and the branch a part of the Chicago & Northwestern Railroad. The shipment originated at Laramie, Wyo., traveling 532 miles on the Union Pacific to Norfolk, Nebr., thence on the Niobrara branch of the Chicago & Northwestern to Dallas, South Dakota, a distance of 154 miles. The rate applied by the Union Pacific

on such shipments from Laramie, Wyo., to Norfolk, Nebr., when for shipment beyond, was ten cents per cwt. The Commission made the following comment upon the question involved:

> "The complainant insists that in constructing rates to points upon this branch we ought to consider it as a part of the Chicago & Northwestern system, and to apply such rates as would be reasonable for the average railroad in that section, without having reference to the conditions which might, if it were an independent railroad, justify the charging of a higher rate. Without undertaking to determine the proper relation between rates upon main line and branches, we do not think that the position of the complainant is well taken in this case. These rates are not between points upon the main line of the Northwestern and the points upon this branch. That company obtains no benefit from any main-line haul with respect to this traffic. Here the Union Pacific has the main-line haul and the service upon the branch is purely local. This ought to be somewhat considered in establishing these rates."

The Commission prescribed seventeen cents as a fair rate on the Niobrara branch of the Chicago & North Western from Norfolk, Nebr., to Dallas, South Dakota, a distance of 154 miles. Upon a mile pro rate basis the North Western would only receive 7.8 cents out of the twenty-seven cents for the entire shipment, while the Commission finds a reasonable amount to be seventeen cents, which is 118 per cent greater than on the *mile pro rate basis*, adopted by the carriers in this proceeding. There are a number of other similar illustrations given in the text of the opinion quoted, but in the absence of mileage to the other points, our statement must be confined to the one example given.

In 1893, the board of directors of the Northern Pacific Railroad Company made an extended statement to their stockholders in regard to the earnings and expenses of their branch lines; in their computations they specifically approve the crediting of branch lines with 60 per cent of the earnings from through business originating on such branch lines. A committee of able financiers had attacked the policy of the com-

pany in regard to the construction of branch lines; the directors in reply were able to show that during the fiscal year under discussion, while there was a deficiency on the branch lines upon the *mile pro rate* basis in the sum of $1,229,961, the main line revenue from this through business originating on these branches was $7,315,554, yielding a net revenue of $4,400,000. Considering the entire result from the standpoint of the system, the net gain from this branch line business, therefore was in round numbers according to their final deductions more than three million dollars. The vital importance of the method of apportioning revenue, justifies this committee in presenting quite fully the statement of the directors of the Northern Pacific Railroad Company, we have referred to.

EXTRACTS FROM A REPORT OF THE DIRECTORS OF THE NORTHERN PACIFIC RAILROAD COMPANY TO THEIR STOCKHOLDERS IN 1893, IN REPLY TO A REPORT OF AN INVESTIGATING COMMITTEE.

To the Stockholders of the Northern Pacific Railroad Company:

"Although the report of the committee appointed October 20, 1892, has not been formally received or acted upon by you yet, inasmuch as it has been given to the public, we deem it wise to make a statement calling your attention to the errors and inaccurate deductions contained in that report. * * * *

"The resolution under which the committee acted did not confine its inquiries to any special period in the history of the road, but since the committee has limited its examination chiefly to the history and policy of the past three years, we think it best at the outset to direct your attention briefly to the history of the road prior to the time when the control of its affairs passed to the present management, and the reasons which governed the policy criticized by the committee.

"Under the policy so adopted, various branches were constructed, some of which have surpassed expectation and earn more than their operating expenses and fixed charges, even when considered as independent lines. Others, as anticipated, have not shown such good results,

but when credited with the benefit to the main line through business originating upon them, on the basis of 60 per cent net, which basis is approved by the committee, show a gain and not a loss to the system at large. This policy of constructing or acquiring branch lines or feeders was adopted long before the charge of your road became vested in the present management, and many of the branch lines had then been constructed. The branch lines earlier in date developed the country surrounding them, and now make a comparatively good financial showing, whereas the more recently constructed or acquired branch lines have not had sufficient time for development; but still, when treated as parts of the entire system, show a gain instead of a loss, and promise to earn in the near future their operating expenses and fixed charges, in addition to the increased earnings resulting to the main line from their operation.

"The committee does not criticize the general policy of constructing and acquiring these branch lines and feeders, and the wisdom of such policy is clearly exemplified by the following statement in its report: The auditor argues that if we assume that the cost to the main line of transporting this branch line business is 40 per cent of its earnings, which would seem to be a reasonable estimate, it will be seen that the net earnings of the main line would be $4,400,000 with which to meet the direct deficiency on these branches of, say, $1,230,000 (p. 14).

"Treating all the branch lines together and as a part of the Northern Pacific System, the result is thus a gain in net earnings to your company of about $3,170,000.

"This policy of constructing branch lines or feeders has not only met with the unanimous approval of successive boards of your directors from year to year, but was formally authorized by you at a meeting of the stockholders of the company, held on the 16th day of September, 1886. The method of construction and acquisition of these roads has been, from time to time, specifically set forth in the various reports of the presidents and other officers of your company, and submitted annually to you at your stated meetings, and up to the present time has received your unanimous approval. When the great business depression upon the coast occurred, your company was constructing branch lines, and had assumed obligations in regard to them which had to be fulfilled.

The meeting of these obligations caused your floating debt. In January, 1891, your directors determined by resolution not to undertake any new construction work or assume any new obligations. This resolution has been strictly complied with.

"Among the alleged acts of the present management which have come under the criticism of the committee are the construction and acquisition of certain specific branch lines or feeders. We will consider them in the order in which they appear in the committee's report. * * * *

"The Duluth & Manitoba and the Northern Pacific & Manitoba should be treated as one, as they form one continuous branch line. When so treated they show a deficit for the year ending June 30, 1892, of $168,545.82. The main line revenue derived from the traffic of this branch line for the same period amounted to $929,008.63; sixty per cent upon this sum, the ratio approved by the committee, is $557,405.18. If this branch be credited with such percentage, it shows, after payment of the interest on the bonds representing this branch line, including the outstanding hotel and terminal bonds at Winnipeg, a net profit to the Northern Pacific Railroad Company of $388,-859.36, or over 4 per cent on the par value of the stocks, amounting to $8,000,000.

"The committee has furnished figures for this line north of the boundary only, and those figures are incorrect. The interest paid by your company on the bonds in the last fiscal year amounted to $164,000, instead of $300,500 as stated by the committee. The actual deficiency was $169,753 instead of $306,253. The amount of business furnished by the Northern Pacific & Manitoba to the lines south of the boundary was for the same period $360,681.85, and upon the same ratio (60 per cent), the net profit on this business amounted to $216,409.01, or a surplus of $46,656 after deducting the above deficiency of $169,753, or more than 4 per cent on the stock of the Northern Pacific & Manitoba Company.

* * * * "This purchase forced the Great Northern to so change its location that the valuable country north of Seattle was left in the possession of your company. In the estimation of competent and disinterested persons, this strategic move brought about the abandonment at that time by the Union Pacific of its proposed line from Portland to Puget Sound. The deficit for the six months

ending December 31, 1892, was $118,802.71. Main line earnings from business originating on this branch line for the same period were $560,160. Sixty per cent of such earnings, the ratio approved by the committee, is $336,096. If this branch be credited with such percentage, it shows a net profit to the Northern Pacific Railroad Company of $217,293.29, or about 12½ per cent on the cost of the stock after payment of interest on the bonds. In the opinion of your board of directors, they would have been guilty of an act of 'stupendous and incredible folly' had they not at the time in question acquired this property. * * * * *

"The committee admits that the branch lines considered together and as parts of your system have produced a net profit of $3,170,000. Each of the branch roads criticised by the committee shows a net profit to your company.

"Your directors, also acting as your agents, consider it their duty to correct these erroneous statements and conclusions, and rectify, if possible, the wrong that has been caused to you by their publication. We, therefore, send this communication to you before the report of the committee has been formally received and acted upon by you. * * * * *

"By order of the Board of Directors of the Northern Pacific Railroad Company.

THOMAS F. OAKES, *President.*

February 28, 1893."

This apportionment of larger earnings to the originating or terminating part of the line than will be given by the *mile pro rate* basis, is entirely justified as exemplified by the well considered opinion of the Interstate Commerce Commission and by the Board of Directors of the Northern Pacific Railway Company. In all business there is what is commonly called the cost of getting business. This is one of the largest items of expense, and is recognized as sound by all competent accountants. The actual expenses are entirely different; the originating road or feeder has very small ton mileage over which to distribute its cost of operation and maintenance and construction. When this traffic reaches the main line, with larger trains, and a greater number of trains, the expense is

reduced to a minimum, and so far as value of road bed is concerned, and cost of maintenance of road bed, an additional car adds only a nominal sum to such cost. Had it not been for that branch line or feeder, the main line would not have had that business. We are therefore confronted with this perplexing problem: What is a reasonable percentage of earnings to be credited to the property originating and terminating the hauls? A failure to make such proper credit of the small traffic on originating and terminating lines which makes possible the dense traffic on the main line invalidates all future computations using such figures. Names have little significance; one road may call a portion of its track a main line, while another road under identically the same circumstances will call such a portion of its track a branch line. The important factor to be considered is whether or not such line can be properly considered a feeder to the main through tracks between large commercial centers.

We do not ask that 60 per cent be adopted as the correct percentage to be credited to the feeders, the lines gathering up the traffic; we merely advance these suggestions to the effect that the *mile pro rate* basis is wholly unsound, unjust and must not be adopted.

Further, as conclusively showing the fallacy of the mile pro rate basis, we call the Supreme Court's attention to the voluntary contracts existing at the present moment between carriers in the state of Minnesota, as evidenced by their division sheets, and tariff sheets.

Some concrete examples will be given, illustrating the foregoing proposition.

Upon a shipment of granite from St. Cloud, Minn., on the Great Northern Railroad to Chicago, the through rate is 11½c per cwt. This through rate and the division between main and branch lines, is given in tariff G. N., G. F. O. 22700, I. C. C. A-3371, Division sheet W. T. L. 412. The mileage west of the Minnesota Transfer is 75, the mileage east of the Minnesota Transfer is 415; dividing the total earnings, 11½c, between those two hauls, upon the mile pro rate basis, will give to that

portion of the haul west of the Minnesota Transfer 1.8c, while that portion east of the Minnesota Transfer will be credited with 9.7c per 100 lbs. Said division sheets, however, show that the line west of the Minnesota Transfer receives 3.4c, and the line east of the Minnesota Transfer receives 8.1c. In other words, *the actual division of the earnings credited to the originating road being 3.4c, as compared to 1.8c, is 89 per cent greater than what would have been credited upon the mile pro rate basis.*

Upon a shipment of granite originating at St. Cloud, Minnesota, and terminating at St. Louis, the mileage of this haul west of the Minnesota Transfer is 75, the mileage south is 581; upon the *mile pro rate* basis, the line originating this traffic would receive 1.4c while as a matter of fact by voluntary contract the line originating this shipment receives 3.5c, which is just 150 per cent greater than upon the *mile pro rate* basis.

Upon a shipment of malleable castings from Chicago to Sauk Center, Minnesota, the mileage west of the Minnesota Transfer is 117, the mileage east is 415; upon the mile pro rate basis, the originating road would receive 4.1c, while as a matter of fact by voluntary contract the said originating road receives 6.7c; the total through rate being 18.5c. In this case, the actual voluntary division of earnings gives the originating road a share more than 50 per cent greater than would have been credited upon the *mile pro rate* basis. These rates and divisions are taken from Tariff G. N., G. F. O. 22700, I. C. C. 93371, Division sheet W. T. L. 412.

The following table shows the rates on the different classes of merchandise between Chicago, Ill., Milwaukee, Wis., Hannibal, Mo., Keokuk, Iowa, and other points, taking the same rates, and certain Minnesota towns. The earnings on each class upon both bases are grouped together. For instance, the through rate between Chicago, Ill., and Appleton, Minn., on first class, is 90 cents; in the columns marked (1), this 90 cents is divided between the portions of the line east and west of the Minnesota Transfer, in accordance with the *voluntary*

contracts existing between the carriers, as evidenced by their division sheets; these columns show the actual division of earnings on such an interstate shipment as they exist today. The columns marked (2) show the division of earnings upon the theory advocated by all the railway companies in this case as the correct theory in this case, that of the *mile pro rate* basis. In the instance we are now discussing, from Appleton, Minn., to Chicago, Ill., the portion of the line west of the Minnesota Transfer originating the shipment would have received from a shipment of merchandise, first class, on the *mile pro rate* basis, 23.7 cents, while as an actual fact, the said line does receive 39.4 cents, being more than 67 per cent greater than upon the basis of division these carriers have adopted in these cases. The other illustrations are analogous to the one just described.

Between Chicago, Ill., Milwaukee, Wis., Hannibal, Mo., Keokuk, Ia., and other points taking same rate.	Miles	1st Class (1) Act. Div.	1st Class (2) Mile pro rate	2d Class (1) Act. Div.	2d Class (2) Mile pro rate	3rd Class (1) Act. Div.	3rd Class (2) Mile pro rate	4th Class (1) Act. Div.	4th Class (2) Mile pro rate
Appleton, Minn.—									
East of Minn. Transfer.	*415	50.6	66.3	45.1	57.4	36.7	46.4	23.3	31.6
West of Minn. Transfer.	149	39.4	23.7	32.9	20.6	26.3	16.6	19.7	11.4
G. N. Through rate....	....	90.	90.	78.	78.	63.	63.	43.	43.
Graceville, Minn.—									
East of Minn. Transfer.	*415	54.7	69.9	47.2	59.4	35.8	46.2	23.3	32.2
West of Minn. Transfer.	179	45.3	30.1	37.8	25.6	30.2	19.8	22.7	13.8
G. N. Through rate...	....	100.	100.	85.	85.	66.	66.	46.	46.
Hutchinson, Minn.—									
East of Minn. Transfer..	*415	39.8	54	33.7	45.9	29.9	39.2	18.9	25.7
West of Minn. Transfer..	63	22.4	8.2	19	6.8	15.2	5.9	10.7	3.9
G. N. Through rate....	....	62.2	62.2	52.7	52.7	45.1	45.1	29.6	29.6

*Distance to Chicago.

"Act. div." is simply an abbreviation for the words "actual division," and indicates the basis upon which the earnings are divided today voluntarily between the carriers. "Mile pro rate" indicates the division of the earnings as they would be upon the theory advanced by the carriers in these cases, which constituted the actual basis used by the carriers in making the division of earnings for the purpose of this litigation, which is directly contrary to their own voluntary contracts with each other.

Authority: W. T. L. Division Sheet, No. 412, Sup. 7, effective 10-10-08. Rates also carried in G. N., G. F. O. 22700, I. C. C. A-3371, effective 5-11-11.

The following table makes a similar comparison of the earnings on interstate shipments, showing how the total earnings are divided voluntarily by the carriers between the originating road and the main line. This table gives the rates on potatoes by the carload from Minnesota points to the Atlantic Seaboard. It is compiled along the same lines as the foregoing table. One concrete illustration will be given:

The through rate on potatoes by the carload from Bald Eagle, Minn., to Albany, N. Y., is 40.2 cents. The proportion of the earnings on this shipment which would be given to the originating line on the *mile pro rate* basis, would be .43 of one cent, while as an actual fact, by voluntary contract, the originating line receives 4.2 cents, approximately *ten times as much as would be given to the originating line by the mile pro rate basis, or the basis of division of earnings adopted by the carriers and by the lower court in these cases.*

RATES ON POTATOES C-L MINNESOTA POINTS TO ATLANTIC SEABOARD, ALSO DIVISIONS ACCRUING TO ORIGINATING LINES.

(In Cents.)

From		To Albany, N. Y.			To Baltimore, Md.			To Boston, Mass.		
		Act. Div.	Mile pro rate	Thru rate	Act. D	Mile pro rate	Thru rate	Act. Div.	Mile pro rate	Thru rate
Bald Eagle	NP	4.2	.43	40.2	4.2	.4	38.2	4.2	.39	44.2
Andover	GN	4.5	.92	40.5	4.5	.9	38.5	4.5	.86	44.5
Cedar	GN	4.8	1.1	40.8	4.8	1.1	38.8	4.8	1.	44.8
Wyoming	NP	5.1	.96	41.1	5.1	.94	39.1	5.1	.91	45.
Stacy	NP	5.4	1.1	41.4	5.4	1.1	39.4	5.4	1.	45.
Big Lake	GN NP	5.7	1.6	41.7	5.7	1.5	39.7	5.7	1.3	45.
No. Branch	NP	5.9	1.4	41.9	5.9	1.3	39.9	5.9	1.2	45.
Becker	GN NP	6.2	1.9	42.2	6.2	1.8	40.2	6.2	1.7	45.
Rush City	NP	6.5	1.8	42.5	6.5	1.7	40.5	6.5	1.6	45.
Rock Creek	NP	6.8	2.3	42.8	6.8	2.2	40.8	6.8	2.1	45.
Barnum	NP	7.	3.6	43.	7.	3.5	41.	7.	3.3	45.
Foley	GN	9.	3.	45.	9.	2.9	43.	9.	2.6	47.

Continued.

From		To New York, N. Y.		
		Act. Div.	Mile pro rate	Thru rate
Bald Eagle	NP	4.2	.4	41.2
Andover	GN	4.5	.89	41.5
Cedar	GN	4.8	1.1	41.8
Wyoming	NP	5.1	.93	42.1
Stacy	NP	5.4	1.1	42.4
Big Lake	GN NP	5.7	1.5	42.7
No. Branch	NP	5.9	1.3	42.9
Becker	GN NP	6.2	1.8	43.2
Rush City	NP	6.5	1.7	43.5
Rock Creek	NP	6.8	2.2	43.8
Barnum	NP	7.	3.5	44.
Foley	GN	9.	2.9	46.

Authorities: W. T. L. No. 9-A I. C. C. No. A-87, effective Dec. 1, 1909. Division sheet, W. T. L. No. 470, effective Dec. 1, 1909.

These illustrations could be multiplied indefinitely. It is practically universally true that the feeding line gets a much larger portion of the earnings from a shipment than would be given by the *mile pro rate* basis. The carriers observe this policy in the consideration of their own accounts, and by their voluntary contracts with each other, always.

(B) That the method of apportionment of value adopted by the lower court compels Minnesota traffic alone to pay a return upon all the property in the state, which includes expensive terminals, added facilities, double tracks, heavy equipment, etc., necessitated solely by the demands of interstate business.

There are three distinct classes of traffic using the property in Minnesota which must be kept clearly in mind, in order to give an intelligent consideration to the issues; they are:

I. Minnesota state traffic, commonly called intrastate business, which is between points in Minnesota.

II. Interstate traffic; this includes all business passing across Minnesota originating and terminating outside, also all traffic terminating or originating in Minnesota and crossing the state line.

III. Minnesota interstate traffic; this is a portion of II, it includes a part of the interstate business including that portion of interstate revenue assumed to be earned within Minnesota; this part is arrived at by the Master in this case by the *mile-pro-rate* method, in the following manner: the earnings from any haul originating at a point in Minnesota, and terminating outside of the state, or *vice versa,* is divided according to the mileage hauled inside and outside of the state. Consider once more a concrete illustration: Suppose $100.00 was the freight charge on a shipment from St. Paul to Spokane. The distance from St. Paul to Spokane, via the Great Northern is 1,475 miles and from St. Paul to Moorhead in Minnesota, just east of the state line, the distance is 241 miles. According to these distances, the $100.00 would be divided as follows:

To interstate traffic, as defined above, $83.66; and

To Minnesota interstate traffic, as defined above, $16.34.

The lower court in rejecting the claims of the state that values should be divided in proportion to the units of user, as passenger-miles or ton-miles, insists that the value of the use, as shown by the earnings, must determine the apportionments of that value. He states this very positively, notwithstanding the fact that *the Master entirely fails to make the division in proportion to actual earnings.* Before stating just what earnings the Master did use let us read once more the language of the court on this point.

He says:

> "The issue is between apportionment by use without regard to the worth or value of the use and apportionment according to the value of the use. The latter basis seems to be more logical and rational. Capitalization is founded on the worth of use, not on mere use. The value of property and of investment in every form is measured by the value of its use; not by its use divorced from the value thereof. The Minnesota Railroad Commission, the railroad companies, all rate makers, base their rates primarily on the worth of the use of the railroad machines by the various classes of freight and by the passengers, and not on the amount of that use. The rate for hauling a ton of merchandise of the first class a mile is not five times the rate for hauling a ton of merchandise of class E a mile, because the former ton mile uses the railroad property five times as much as the latter, but because the use by the former is worth more than the use of the latter. Moreover, there is no unit of measurement of ton miles and passenger miles, of freight car miles and freight engine miles, or of passenger car miles and passenger engine miles, divorced from the values of the uses they make of the railroad property, from the classes of loads they carry and the distances these loads are hauled. Indeed, there is no proportioning or measuring relation between such varying uses of property, when no regard is given to the value of these uses.
>
> "On the other hand, the values of the uses, the earnings of the property, unavoidably condition the value of the property used, and present a natural and equitable basis

of apportioning that value to these uses." (Nor. Pac. Rec. Vol. 1, pp. 426, 427.)

Assume the illustration of the two tons using the St. Paul terminal, the intrastate haul of 113 miles (the average in the state) earns $1.00, the interstate haul of 412 miles earns $2.00. If the terminal value is to be divided upon the value or worth of the user as measured by the earnings, on the theory that "the values of the uses, the earnings of the property unavoidably condition the value of the property used, and present a natural and equitable basis of apportioning that value to these uses," then in that case the ton carried on the interstate haul must be charged with twice as much value as the intrastate shipment. If the terminal value properly chargeable to the two hauls was $9.00, the intrastate haul would be charged with $3.00, and the interstate haul with $6.00.

But this is precisely what the Master did not do. He only took that portion of the interstate haul inside of the state lines —which averages about *152 miles.* In other words he assumed the earnings of the interstate shipment to be that portion of $2.00 which is represented by the ratio of 152 to 412, or 73 cents. The intrastate haul is charged with the balance of the terminal value. The $9.00 terminal value, assumed above would then be divided between the two hauls in the proportion of .73 to 1.00, or $3.79 to the interstate haul, and $5.21 to the intrastate haul, thereby charging the intrastate haul with 38 per cent more terminal value than the interstate haul, *notwithstanding the actual revenue from the former is only one-half of the latter.* Considering the revenue inside of the state for the purpose of dividing the value of road bed which is used for every mile the ton is hauled, is entirely a different proposition from using the revenue inside the state lines for the purpose of dividing the value of the St. Paul terminal which is used but once on the entire trip, and should be spread out over the entire trip.

Referring to rates on wheat in carloads, shown in Exhibit 44, Baird, being rates in effect September 1, 1905, the rate on a carload of wheat weighing 80,000 pounds from De Mores,

North Dakota, (600 miles) to Minneapolis, was 20½ cents per hundredweight, the rate from Wadena Junction (150 miles) to Minneapolis was 10½ cents per hundredweight; this would produce total earnings as follows: on the car from De Mores, North Dakota, 600 miles, $164, and on the car from Wadena Junction, Minnesota, 150 miles, $84. Thus for the same commodity carried in the same train, and enjoying the same facilities, the interstate car on the *mile pro rate* theory of division would earn from Wadena Junction to Minneapolis only $41, while the intrastate car, over the same facilities, would earn $84; and consequently on the revenue theory for the division of value, the intrastate car is charged with having had the use of over double the value of the facilities, the road bed, and of the St. Paul terminal than is charged against the interstate car.

A car of lumber from Tacoma to Minneapolis (1900 miles) weighing 30,000 pounds, would be billed at 45 cents per hundredweight and earn for the entire haul $135. A car of the same commodity from Moorhead, Minnesota, to Minneapolis (250 miles), of the same weight, would on the terminal tariff rate pay 15 cents per hundredweight, or a total of $45; the pro rate earnings for Minnesota on the interstate car would be 5-38 or approximately $17.75 as against $45 for the intrastate shipment of the same commodity over the same tracks and facilities, for the same distance and likely to be in the same train; and when the division of value is made on the theory adopted by the Master, the intrastate carload of lumber is burdened with having used over 2½ times as much of the value as the interstate carload. Practical examples of this kind, without number and without end, could be cited to demonstrate the unfairness of the theory adopted by the Master in apportioning values on that portion of the revenue he selected.

The result of the Master's computation is that Minnesota business, (including I and III,) must support and pay a return upon the value of terminals used by the entire system. The significance of this method can readily be grasped when

the figures given by the Master are considered. On the Northern Pacific, the value of the terminals at St. Paul, Minneapolis and Duluth, as found by the Master, was $17,315,869.45; while all other lands in the state were only worth $3,708,693.45. (Nor. Pac. Rec. Vol. 1, p. 220.) It is preposterous to claim these extensive costly terminals at Duluth and the Twin Cities, valued at almost five times all the rest of the land in the state, are used exclusively for Minnesota business. And yet that is precisely what the Master must rely upon to justify his computations. He divides the value of these terminals between the state and interstate business upon the revenue basis, the intrastate revenue, of course, being confined to the revenue from hauls between points in Minnesota; and the interstate revenue *being confined to the earnings from only that portion of interstate hauls within the boundary line of the state.*

The return upon the value of the terminals should be earned by the entire hauls, this cost should be distributed over the whole length of hauls using the terminals. This is the very reason advanced by the carriers in support of the claim that the cost per ton mile on a long haul is less than on a short haul, it being constantly reiterated that the cost of terminals is distributed over a larger number of miles on the long hauls. The terminal at St. Paul is just as necessary and just as legitimately a part of the facilities furnished for a haul from Butte, Montana, as from Albert Lea, Minnesota. This terminal is a necessary facility for the entire system business going to or from St. Paul, and yet the Master in this case makes Minnesota pay all such costs.

The situation is similar in regard to the *charging Minnesota alone* with the cost of maintenance and the payment of a return upon the value of double tracks, heavy road bed, and heavy equipment, which would be almost entirely unnecessary were it not for the *requirements of interstate traffic.*

(C) That the entire theory for the separation of values upon the revenue basis is unlawful, and has been repudiated by this court.

In the cases at bar, the Court and the Master have apportioned the values of the properties of the various companies upon the revenue basis. The object of these computations is to find out whether the value of that portion of the property which is properly chargeable to state business earns a rate of return which is reasonable or unreasonable, confiscatory or not confiscatory. It is of equal importance that the values of the properties shall be apportioned between state and interstate business upon a reasonable and fair basis, as well as that the expenses and the revenues shall be so divided that justice will be given to both state and interstate business.

The revenues of a company depend upon what the rates are, as well as the volume of traffic; if the rates should be twenty per cent or fifty per cent too high, then the revenue would be twenty per cent or fifty per cent larger than was just. Consequently, if you have divided the value of the property upon the revenue basis, and that revenue is too large, then you are compelling the state of Minnesota to pay a return upon a value which is too large. Dividing value upon the revenue basis automatically justifies the existing standard of rates; if those rates are too high, then the value is too high, and you compel the state to pay a return upon value which is larger than it should be. The rates would thus hold themselves up. The absurdity of such a basis is so patent on its face that it approaches close to the ridiculous.

The fallacy of dividing value on the revenue basis was clearly described, and that method was specifically rejected, by this Court in *Chicago, Milwaukee & St. Paul Ry. Co. v. Tompkins*, 176 U. S. 167, where the late Justice Brewer stated in the opinion:

AS TO THE METHOD OF DIVIDING VALUE.

"The court found the value of the plaintiff's property in South Dakota to be $10,000,000, although, according to the testimony, it was bonded for over $19,000,000. It held that it was not fair to consider that sum, $10,000,000, the value of the property employed in doing local business, for it was also used in doing interstate business; and that the true way to determine the value of the property which could be regarded as employed in local business was by dividing the total value of $10,000,000 in the same proportion that existed between the amount of gross receipts from interstate business and that from local business, each of which amounts was, as we have seen, accurately shown by the testimony. * * *

RESULT OF DIVIDING VALUE ON REVENUE BASIS.

"But that there was some fallacy in this reasoning would seem to be suggested by the fact that although the defendant's schedule would have reduced the actual receipts 15 per cent on the passenger and 17 per cent on the freight business, the earning capacity for the last year was diminished only one-tenth of one per cent. Such a result indicates that there is something wrong in the process by which the conclusion is reached. That there was, can be made apparent by further computations, and in them we will take even numbers as more easy of comprehension. Suppose the total value of the property in South Dakota was $10,000,000, and the total receipts both from interstate and local business were $1,000,000, one-half from each. Then, according to the method pursued by the trial court, the value of the property used in earning local receipts would be $5,000,000, and the per cent of receipts to value would be 10 per cent. The interstate receipts being unchanged, let the local receipts by a proposed schedule be reduced to one-fifth of what they had been, so that instead of receiving $500,000 the company only receives $100,000. The total receipts for interstate and local business being then $600,000, the valuation of $10,000,000, divided between the two, would give to the property engaged in earning interstate receipts in round numbers $8,333,000, and to that engaged in earning local receipts $1,667,000. But if $1,667,000 worth of property earns $100,000 it earns 6 per cent. In other words, al-

> though the actual receipts from local business are only one-fifth of what they were, the earning capacity is three-fifths of what it was. And turning to the other side of the problem, it appears that if the value of the property engaged in interstate business is to be taken as $8,333,000, and it earned $500,000, its earning capacity was the same as that employed in local business—six per cent. So that although the rates for interstate business be undisturbed, the process by which the trial court reached its conclusion discloses the same reduction in the earning capacity of the property employed in interstate business as in that employed in local business, in which the rates are reduced."

The Master in the *Alabama Rate Cases,* recently decided, has discussed the revenue basis for the division of value in the following terms:

> "The foregoing figures and tables effecting a division of complainant's property used as a common carrier in Alabama between its interstate and its intrastate traffic are made on the basis of the operating expenses of rendering the service, and not upon the usual revenue basis. The objections to the latter method are insuperable..... But independently of this there is the further objection, very much urged by the defendants in the early part of this case, that, when the question is one of the reasonableness of rates, the value which determines the rates should not be determined by the rates themselves or revenues based thereon. Statutory rates by this process would always justify themselves by automatically fixing the value of the property to correspond, so that there could be no confiscatory rates, unless the value is determined independently of the revenue.....

(Special Master's Report in the *Case of South and North Alabama R. R. Co. v. Railroad Commission, etc.,* in U. S. Circuit Court, Middle District of Alabama.)

The reverse of the foregoing comments is equally true: If the rates are too high they automatically compel a return upon a value which is too high.

Various methods of allocating value between state and interstate business, are commonly known as the ton mile and pas-

senger mile basis, the expense basis, train mileage basis, and the use basis.

It is not believed by the representatives of the railway commissions who are filing this brief, that it is necessary or even advisable that we shall at this time discuss in detail these various methods; it is sufficient that we show the utter unreasonableness of apportioning value on a revenue basis when the fairness and justice of that revenue itself is at stake. That being true, these cases should be remanded to the lower court or to the commission with instructions to adopt some other method appropriate for the purposes of this case and in accordance with law and justice.

This course is the one pursued by the Court in *Chicago, Milwaukee & St. Paul v. Tompkins*, 176 U. S. 167, and has been followed in many other cases where necessary facts are not in the record; these cases are more fully considered under the second subject of this brief, which embraces a discussion of the proper procedure when the record fails to show facts necessary for the determination of the issues involved.

PART VI.

THE APPORTIONMENT OF VALUES UPON THE EXPENSE BASIS, AS MADE BY SPECIAL MASTER OTIS, BUT NOT ADOPTED BY JUDGE SANBORN, IS UNREASONABLE AND UNJUST.

The lower court adopted the revenue basis as the correct one for the apportionment of value of properties between state and interstate, passenger and freight traffic. Presumably in order to show that if the expense method had been adopted, the result would have been substantially the same, so far as sustaining the orders of the Minnesota Commission was concerned, the Master made a division of values in proportion to the operating expenses of each class of traffic. In determining what are the operating expenses properly chargeable to intrastate freight traffic Mr. Otis assumes that it costs 2½ times as much to haul a ton one mile between points inside the state, as it would if one of the points were outside of the state, and the other inside. When this assumption is extended so as to apply to property used, the result becomes absurd, and this probably accounts for the meagre notice given to these computations by the Master in his report. (See Nor. Pac. Rec. Vol. 1, pages 265 and 271.)

It may be true that the small size of the trains, the short haul, etc., cause the operating expense of hauling a ton one mile between points inside of the state to exceed the operating expense of hauling a ton of interstate traffic, but in no way does it effect the cost of one mile of road-bed or of real estate, whether the ton hauled over it is destined to Spokane or to Moorhead. If after allowing 2½ times the average operating expense of interstate traffic, you in addition charge up each ton-mile of the state traffic with 2½ times the cost of the right of way you are multiplying the injustice to an unconscionable degree. The cost so far as the right of way, and road-bed is concerned, including grading, clearing, grubbing, ties, rails,

ballast, bridges, trestles, culverts, etc., etc., is precisely the same for each ton mile whatever may be the ultimate destination.

The results of applying the method, described above, to terminal values, are equally fallacious, and they will now be discussed. The error in the computation is based upon the fact that the Master charges the interstate traffic with only that portion of the terminals which is determined by the ratio of the interstate ton miles *within the state* to the intrastate ton miles. It is much easier to explain this by a concrete example than by a discussion of abstractions.

Substantially all the traffic between points in Minnesota use the terminals at the Twin Cities but once. Over 75 per cent of the real estate values of the Great Northern in Minnesota are located at the terminals in the Twin Cities, according to Mr. Otis. (Nor. Pac. Rec. Vol. 1, pages 220 and 221.)

The average haul of Minnesota intrastate traffic in 1908 was 113 miles; of interstate traffic touching Minnesota, 412 miles, (Nor. Pac. Rec. Vol. 1, p. 256); and of that portion within the state of interstate hauls touching Minnesota 152 miles, (Exhibit Ward 53, Great Nor. Rec.)

Let us consider two tons going out of St. Paul, one hauled the average distance between points in Minnesota (113 miles) and the other hauled the average distance of interstate traffic touching Minnesota (412 miles); let us assume the expenses to average 5 mills per ton-mile on the interstate haul, then the average on the intrastate haul would be 12.5 mills according to the Master's arbitrary ratio of 2½ to 1; and let us assume that portion of the fair value of the terminal upon which the two tons must pay a return to be $2.00. The just and legitimate way of dividing that terminal value would be $1.00 to the ton destined to the point in Minnesota, and $1.00 to the ton destined to the point outside of the state.

Now let us follow carefully the intricate maze of computations through which the Master's method would lead us. In

order to arrive at the proper percentage or proportion upon which to divide the $2.00 he would find the operating expenses of each haul. In order to secure the percentages upon which he divides the value, he finds the total operating expenses of the state and interstate traffic, the latter being confined to that portion of the interstate traffic touching Minnesota, which is contained *within the state lines* of Minnesota. He first ascertains the total operating expenses expended within Minnesota, and divides this arbitrarily into two totals which have the following relationship to each other: (let x represent the cost of hauling one ton of interstate traffic one mile, then 2½x must equal the cost of hauling an intrastate ton one mile) the number of ton miles of interstate traffic multiplied by x plus the number of ton miles of intrastate traffic multiplied by 2½x must equal the total operating expenses incurred in Minnesota. (Nor. Pac. Rec. Vol. 1, pp. 260, 261.)

Since we have all these factors definitely fixed in our concrete example the effect is easily understood. The number of ton miles of the intrastate haul (1 ton multiplied by the average haul, 113 miles) is 113; the number of ton miles of the interstate haul (1 ton multiplied by the average haul inside of Minnesota, 152) is 152. 113 multiplied by the average expenses per ton mile (intrastate) stated above, 12.5 mills, equals $1.41 which represents the operating expenses on the intrastate haul. 152 multiplied by the average expenses per ton mile (interstate), 5 mills, equals 76 cents, which represents the operating expenses on the interstate haul. Dividing the terminal value of $2.00 in the ratio of 141 to 76, we find the total terminal value upon which the intrastate haul must pay a return to be approximately $1.30, while the terminal value upon which the interstate haul must pay a return is approximately only 70 cents. In other words on two typical hauls as shown by the carriers' own exhibits, starting from the same terminal, the ton destined to a point inside of Minnesota must pay a return upon that portion of the value of the said terminal which is 85 per cent greater than the value upon which the ton pays which is destined to a point outside of the state. The illustration is typical, we have used the average haul of

both state and interstate traffic, and have observed the ratios fixed by the Master.

This terminal value, as stated before, should be divided equally between the two tons. And any system or method which causes one to pay 85 per cent more than the other is unfair and unjust. What makes this of tremendous significance is that three-fourths of all the real estate value in Minnesota on the Great Northern is located in the Twin Cities.

It may be suggested that this error described above, is offset in the final figures by the fact that intrastate traffic almost always uses two terminals in Minnesota, while it is claimed interstate traffic uses but one; (however it is conceded that interstate traffic uses the terminal at St. Paul or Minneapolis.) This would make little substantial change in the situation for the following reasons. Out of a total value of property in Minnesota on the Great Northern amounting to over $138,000,000, the total value of all the terminals *added to the value of the real estate and all the right of way,* exclusive of the terminals in the Twin Cities, is less than $7,000,000. The total value of all terminals outside of Minneapolis and St. Paul would be very insignificant compared to the total value of the property owned by the Great Northern Ry., in the state of Minnesota, and *their entire cost could be charged to intrastate traffic without materially changing the final results as stated in the preceding paragraphs.*

Without attempting to go extensively into details we suggest to the Honorable Court that no wholesale guess should be permitted to stand in making this allocation; what the court said in the case of *Chicago, Milwaukee & St. Paul v. Tompkins,* 176 U. S. 167, as to the division of value upon the revenue basis applies with equal force to an attempted division guessed upon the total expense basis, where all the passenger and freight expenses are mingled together.

A carefully framed system should be worked out based substantially upon the use of the property actually made by the different kinds of traffic. Terminal values, and right of way

values, should be divided in proportion to the units of traffic making use of them; a few items may necessarily be divided upon other bases, but that the most of the values are equitably distributed upon the units of actual traffic using said property is evident. Any wholesale guess in this part of the computations invalidates all further deductions.

PART VII.

THE LOWER COURT ERRED BY INCLUDING IN THE VALUE ENTITLED TO A RETURN, MANY FACTORS WHICH SHOULD HAVE BEEN EXCLUDED.

The lower court, in these cases, has adopted the cost of reproduction, *new*, as the sole test for determining the reasonableness of the return secured by the carriers on their traffic. Under Part VIII of this brief we will discuss the injustice of adopting the cost *new*, as the basis, without allowing for depreciation; in this section of our brief we will consider the consequences following the adoption of reproduction cost as your sole standard.

Reproduction cost carried to the extreme and made the sole test, as the Master has done in these cases, is not equivalent to "fair value."

The elements to be considered in making a valuation of a railroad for rate-making purposes were clearly stated in the oft-quoted paragraph in *Smyth vs. Ames.* We do not believe this court intended at that time, and we do not believe this court now intends, to make any one item the sole basis. All of the factors must be considered and given their proper weight as the circumstances of the case may demand.

Reproduction costs have much significance. A rail by itself, in and of itself, has not the same value as a rail in place on a roadbed, in active use, carrying freight between stations. Putting the rail in place includes selecting the place, organizing your labor, laying the rail, and all other necessary expenses connected therewith.

We fully recognize the great importance which must be attached to any figures representing the cost of reproduction, but we also know there are other elements which must be

reckoned with in connection with reproduction cost. The fair value of a plant is not the original cost added to betterments and improvements, nor is it the capitalization of the company, nor the cost of reproduction in its present condition, nor is it the cost of reproducing it new, but all of these factors must be considered.

The carriers' own witnesses, who established the facts as to the cost of reproduction *new*, have little confidence in their own figures as any criterion of present value. (Nor. Pac. Rec. 198, 3243, 3246; Grt. Nor. Rec. 161, 463, 1351.)

The ignoring of all other factors has led the Master to some strange and unique conclusions. He allows over a quarter of a million dollars in the valuation of the Northern Pacific property, for a viaduct that company did not build. (Nor. Pac. Rec. Vol. 1, p. 226.) This viaduct was built by the City of St. Paul after the road was built. In view of the fact that "it forms an adequate passageway for the movement of trains," etc., the Master credits this sum to the company. He also allows $54,580 to the M. & St. L., for three bridges in Minneapolis built by the city, and "a part of the street highways." (Nor. Pac. Rec., Vol. 1, p. 231.) He includes "street crossings or parts of streets used for right of way held under rights acquired from the respective city authorities without acquisition of the fee." The reason the Master gives is that "For railroad purposes these rights are substantially as valuable as if held under absolute title. They are permanent in character and in case of reproduction would cost practically as much as private property." (Nor. Pac. Rec., Vol. 1 p. 224.)

Forty-two per cent of the area of Northern Pacific terminals in Minnesota are not used for railway purposes (Defendants *Exh. M*, Cooper), and yet the Master makes no allowance for this.

Adaptation and solidification of roadbed is allowed for three times in the Master's computations; it is allowed as a part of the value entitled to a return (Nor. Pac. Rec., Vol. 1, pp. 225, 235, 236, 237); then later it is allowed as one of the offsets against depreciation (Nor. Pac. Rec., Vol. 1, p. 238); while

it has already been taken care of under operating expenses. The Master allows full value for all right of way whether purchased or given to the company, adding all the unearned increment, or increase in the value of the said right of way, and multiplying all this by two and a quarter to secure what the Master is pleased to call "severance damages." (Nor. Pac. Rec., Vol. 1, p. 224.)

The reliance upon the expert witnesses presented by the railway companies is quite remarkable. Wherever a conflict exists on some substantial matter, the Master adopts the figures submitted by the carriers, almost without exception. The following is a typical passage from the opinion of the lower court indicating his bias in favor of the carriers:

"This division was supported by the testimony of Mr. Hillman that in his opinion it was right and reasonable and by his statement of his reasons for this belief. But no other witness came to support his view. On the other hand a large number of witnesses, who had long been familiar with the details of the expense of operating railroads, who had enjoyed a long experience in their actual operation, and who had considered in the light of their knowledge and experience and formed opinions concerning a just division of this common cost, testified that the allocation made by the companies and finally adopted by the Master was fair and just. This testimony was buttressed by evidence that this basis of division had been used by these and other railroad companies for their own information and convenience for some time before the questions here at issue had arisen, and that it had at one time received the approval of the Interstate Commerce Commission. So it is that whether the knowledge, experience, and opportunities of the witnesses to form correct judgments upon this issue or their numbers be considered, the great preponderance of the evidence sustains the division made by the Master, and it must stand." (Nor. Pac. Rec., Vol. 1, p. 428.)

Here we find no discussion whatever of the merits of the question, but the position by the railway witnesses is adopted, because of their larger number and longer years of service.

If this rule be widely adopted it will be impossible for the railway companies to fail, the public must always lose.

In addition to all these items we find that the Northern Pacific and Great Northern have built many betterments and improvements out of surplus earnings, upon which they are now demanding a return from the public.

The foregoing are a few concrete illustrations of the methods adopted by the lower court. These have led to a grossly exaggerated valuation. The easiest way to demonstrate this is to compare the results of his computations with those arrived at by the Interstate Commerce Commission for the same property. The Master extends his computations on the same methods and basis so as to cover the entire system of the company. (Nor. Pac. Rec., Vol. 1, pp. 245, 246.)

In the case of *City of Spokane vs. Northern Pacific Ry. Co. et al.*, 15 I. C. C. Rep. 376, 401, the Interstate Commerce Commission describes the cost of reproduction of the Great Northern system. The testimony before the commission was that of the engineer of the company. The valuation contained a "detailed account of its tunnels, bridges, culverts, weight of rails, number of ties, amount of ballast, etc." The engineer testified "there were in the offices of the company detailed surveys showing the quantities of earth and rock in case of 82 per cent of the entire system, and that it was possible to make a very close estimate with reference to the remaining 18 per cent." This estimate of the company's engineer placed the entire cost of reproduction, based on prices in the Spring of 1907, at $415,000,000.

These computations were submitted to Mr. Gillette of the Washington Railroad Commission who stated there should be a reduction of $80,000,000. The Interstate Commerce Commission makes some corrections to eliminate duplications and to cover system figures as reported to the Commission, finding a total value of the Great Northern System to be $270,000,000. The Commission says: "These estimates of the cost of reproduction in case of both the Northern Pacific and the Great Northern were made in the spring of 1907, and it was said

in testimony that the cost of reproduction, not including the right of way, at that time would have been from 12 to 15 per cent higher than three or four years before. The cost of constructing these properties when these estimates were made would probably exceed by 50 per cent the cost of constructing them when the Pacific extension of the Great Northern was built."

Contrast the foregoing figures with those guessed off by the Master in the Minnesota Rate Cases,—Mr. Otis finds the cost of reproduction of the Great Northern System in 1908 to be $549,253,317; and after deducting interest in a subsidiary property and for lines under construction he finds a net value of $518,206,215, which is $248,000,000, greater than the value found the previous year by the Interstate Commerce Commission, $183,000,000 greater than the value found by Mr. Gillette of the Washington Commission, and more than $100,000,000 greater than the estimate of the company's own engineer testifying before the Interstate Commerce Commission. The company's annual report to its stockholders, which is a part of the record in this case by concession of parties, shows that during the year ending June 30, 1908, $24,000,000, in addition to advances to subsidiary lines, had been spent in additions and betterments to its property including new equipment, and new construction, making Mr. Otis' estimate exceed that of the engineer of the company itself before another tribunal by more than seventy-five million dollars.

The present value, or the cost of reproduction, of the Northern Pacific was found by the Master to be $486,738,161 (Nor. Pac. Rec., Vol. 1, p. 246); while he found the original cost of construction to be over one hundred and seventy-four million dollars less, or $312,243,555, (Nor. Pac. Rec., Vol. 1, p. 241.) The net cash investment in the Northern Pacific, as of June 30, 1908, was $279,811,715; this, including $60,000,000 of the recent stock subscriptions for new construction, leaves a net investment in the property on that date of $219,811,715. (Nor. Pac. Rec. 1162, defts. ex. M. M. Gray, ex. 14 Gray.) (Nor. Pac. Rec., Vol. 1, p. 241.) The Interstate Commerce Commission

found the original cost of the Northern Pacific, according to the best evidence obtainable, to be only $241,000,000; and in this sum was included $65,000,000 expended in constructing 550 miles originally at a cost of over $110,000 per mile, while "the cost of constructing the Great Northern, which was completed in 1892, and which was probably a better road than the Northern Pacific in 1896, was stated by its vice-president to have been $27,000 per mile." (*City of Spokane vs. Northern Pacific Ry. Co. et al.*, 15 I. C. C. Rep. 376, 398.) The capitalization of the Northern Pacific was found by the Interstate Commerce Commission to be $342,000,000. The Northern Pacific complaint in these cases claimed a value of $350,000,000 (Nor. Pac. Rec., Vol. 1, p. 140, par. 17 of complaint.) The present value of the Northern Pacific, as found by Special Master Otis, was one hundred and forty-four million dollars greater than the total capitalization, one hundred and thirty million dollars greater than claimed by the company itself in its own complaint, and two hundred and forty-five million dollars greater, or more than double the original cost of construction, as found by the Interstate Commerce Commission.

In these exaggerated valuations found by the lower court many items were included, without justification either in reason or in law.

ELEMENTS OF FAIR VALUE.

This Court stated in the leading case of *Willcox v. The Consolidated Gas Company* (212 U. S. 19, 52):

"And we concur with the court below in holding that the value of the property is to be determined as of the time when the inquiry is made regarding the rates. If the property which legally enters into the consideration of the question of rates, has increased in value since it was acquired, the company is entitled to the benefit of such increase."

The fundamental question becomes, what property "*legally* enters into the consideration of the question of rates."

In the past various applications of the doctrine as to the basis for rate-making have been made to concrete cases. In

this manner the doctrine has gradually gained strength. There are so many conflicting interests to be considered and profound issues, of such tremendous importance, it would seem that the course pursued by the Supreme Court, in gradually evolving these principles, has been more fortunate for the country than if the members of Congress had reasoned out *a priori*, a standard, a rule of thumb to go by, back ten or fifteen years ago.

But few of the principles are, as yet, definitely fixed; we have no way of determining the relative weight to be attached to the different factors enumerated by this court, as demanding consideration.

In the epoch-making case of *Smyth v. Ames*, the attorneys for the railroads, as in the cases now pending, tried to rest their entire case on one proposition to the exclusion of all others. They contended that a railway company is entitled to exact such charges for transportation as will enable it at all times not only to pay operating expenses, but also to meet the interest regularly accruing upon all its outstanding obligations, and justify a dividend upon all its stock. The court specifically refused to adopt that doctrine.

It is true capitalization was one of the factors specifically named by the court to be taken into consideration; but it was only one of several. The cost of reproduction new was also one factor named, but there were others. "In order to ascertain that value," Mr. Justice Harlan for the Court, enumerated the following items, stating that they "are all matters for consideration, and are to be given such weight as may be just and right in each case:"

I. The original cost of construction;

II. The amount expended in permanent improvements;

III. The amount and market value of its bonds and stock;

IV. The present as compared with the original cost of construction;

V. The probable earning capacity of the property under particular rates prescribed by statute;

VI. The sum required to meet operating expenses.

Mr. Justice Harlan added there may be other matters to be considered in estimating such value.

It is just as wrong to consider one part of the fourth item, the cost of reproduction, new, to the exclusion of all others, as it is to take capitalization, or original investment as your sole standard.

The determination of what factors shall be included in that "fair value," upon which a company is "legally entitled to a return," is one of profound importance. Gradually, as in the past, with the wisdom of experience, you will be able from time to time to mark limitations here and there, you will be able to say this shall not be included, and that shall be included.

We find no precedents in the decisions of the courts, or of commissions, bearing directly upon the issue whether a carrier is entitled to a return upon that which has been given to it without cost, such as right-of-way grants, unearned increment, bridges built at public expense, or betterments and improvements built out of surplus earnings over and above operating expenses and a reasonable return upon the value of their property. These questions present some important and far-reaching problems which must be discussed on fundamental principles, aided by a few somewhat analogous and well considered decisions of various representative courts and commissions.

INCREASE IN RIGHT OF WAY VALUES.

If the carriers in these Minnesota Rate Cases are allowed a return on increased land values, and terminal properties, there can be no logical reason why the same shall not be permitted for practically all other railroad systems in the country. It may prove to be a very dangerous precedent.

It has been estimated that our government has made gifts to American railways of over two hundred and fifteen million acres of land, a tract larger than Germany and Italy combined. In addition to this they have been given hundreds of millions in cash. This is all exclusive of immense donations from private individuals, cities and states.

Judge Sanborn's theory assumes that all other circumstances remain just as they are, while you eliminate railroads, and then start upon their re-construction; this assumption could never exist, so far as cities and terminals are concerned. The terminals, the cities and the factories, would not be there if the railroad was not there. Terminals depend on the railroads for their value. This relationship between terminals and railroads, connected with the question as to the value of one independent of the other, presents a new question, a new situation to this court; it is different from the Gas Company's property, the street railway, or any ordinary public utility.

In the *Spokane rate case* (*City of Spokane v. Northern P. Ry. Co., et al,* 15 I. C. C. Rep. 376) the full significance of this problem about land values challenged the serious consideration of the Commission. Mr. Commissioner Prouty, in his opinion for the Commission, relates the enormous advance in land values at certain terminals on the Great Northern and Northern Pacific, this being from 500 to 600 per cent in a few years, and the enormous reproduction cost estimated on right-of-way, large portions of which have cost these companies nothing whatever. He follows this brief summary with these words:

> "Whatever may be true today, in the comparatively near future the structures of the railways of this country will be less in value than the land upon which they stand, estimated as the value of the right-of-way has been estimated in these cases. Whether, under the laws and Constitution of the United States, our railroads can demand a return not only upon the money which has been actually invested in these properties, but also upon this value, which has grown from almost nothing to vast proportions without the expenditure of money or the assumption of risk, is a question of tremendous importance.

"Elaborate briefs have been submitted by counsel, at the request of the Commission, upon this question, but it does not seem profitable to discuss or decide it in this connection." (15 I. C. C. Rep p. 414, 415.)

This issue is now squarely before the Supreme Court. In the *Western Advanced Rate Case* before the Interstate Commerce Commission last year, Mr. Commissioner Lane made a comment similar to that quoted above from Mr. Prouty. Mr. Lane said:

"It remains for the Supreme Court yet to decide that a public agency, such as a railroad created by public authority, vested with governmental authority, may continuously increase its rates in proportion to the increase in its value, either (1) because of betterments which it has made out of income, or (2) because of the growth of the property in value due to the increase in value of the land which the company owns.

"If the position of the Burlington is sound and is a precise expression of what our courts will hold to be the law, then as we are told there is certainly the danger that we may never expect railroad rates to be lower than they are at present. On the contrary, there is the unwelcome promise made in this case that they will continuously advance. In the face of such an economic philosophy if stable and equitable rates are to be maintained, the suggestion has been made that it would be wise for the government to protect its people by taking to itself these properties at present value rather than await the day, perhaps 30 or 50 years hence, when they will have multiplied in value ten or twenty fold."

"*Western Advanced Rate Case,*" 20 I. C. C. Rep. 307, 339, 340.

The reasons for disregarding any increase in the value of franchises as stated in *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, tends to support the argument against including any increase in the value of the right-of-way as a part of that value upon which a railroad company is entitled to a return.

The franchise right of the Consolidated Gas Co. in the case of *Willcox v. said Company,* 212 U. S. 19, "consisted," in the language of the Supreme Court, (at page 45), "in the

right to open the streets of the city and lay down mains and use them to supply gas, subject to the legislative right to so regulate the price for the gas as to permit not more than a fair return (regard being had to the risk of the business) upon the reasonable value of the property at the time it is being used for the public."

Similarly, the right-of-way which a railway company secures, is the right to appropriate a certain portion of farm lands, town lots and city streets, lay down ties and rails, and use them for supplying transportation to the public, subject to the legislative right to so regulate the price for transportation as to permit not more than a fair return (regard being had to the risk of the business) upon the reasonable value of the property at the time it is being used for the public.

The right-of-way is a right to use the land for railroad purposes, a privilege savoring of the nature of government, which must be paid for and yet can be forced from an unwilling land owner by all the machinery of the state and nation. It is a privilege which is fairly and justly analogous in all essentials with the franchises of a street car company or a gas company, except that it goes beyond city limits, and crosses farm lands. In perhaps four-fifths of the railway mileage in this country, the railway companies have secured their right-of-way at a merely nominal price. In these cases now pending, the court below desires to add to the first cost of right-of-way a sum arrived at by finding the increase in the value of surrounding real estate, and second, by assuming that the company would have to pay two or three times that amount by way of damages, called severance damages, to the land owner.

Such value is purely speculative, and has no foundation in fact or in law. The comments of this court in the Gas case, referred to above, are again so pertinent to the matter under discussion, we cannot refrain from quoting another paragraph. Mr. Justice Peckham, in the opinion of *Willcox v. Consolidated Gas Co., supra,* makes the following comments

upon the added value of the franchise of the street car company, because of increased business, etc.:

> "The important question is always one of value. Taking their value in this case as arrived at by agreement of their owners, at the time of the consolidation, that value has been increased by the finding of the court below to the sum of $12,000,000 at the time of the commencement of this suit. The trial court said: 'If, however, complainant's franchises were worth $7,781,000 in 1884, and its tangible property, at the same time, was appraised (as appears in evidence), at $30,000,000 (in round figures), then since complainant's business (in sales volume) has, in twenty-three years, almost quadrupled, and its tangible assets grown to $47,000,000, it appears to me that a fair method of fixing the value of the franchises in 1905 is to assume the same growth in value for the franchises as is demonstrated by the evidence in the case of tangible property. If, therefore, the franchise valuation of 1884 was proportioned to personalty and realty of $30,000,000, a franchise valuation proportioned to $47,000,000 in 1905 would be over $12,000,000. This, I think, a logical result from the assumption I am compelled to start with, i. e., that franchises have a separate and independent value. But there is, however, no method of valuing franchises, except by a consideration of earnings; earnings must be proportioned to assets; and both kinds of assets, tangible and intangible, must stand upon the same plane of valuation; having, therefore, a measure of growth of tangible assets from 1884 to 1905, the franchise assets must be assumed to have grown in the same proportion. I find that the value of complainant's franchises at the date of inquiry was not less than $12,000,000, making a total valuation of $59,000,000, upon which the probable return is $3,030,000, or very considerably less than 6 per cent.' The judge stated his own views as opposed to including these franchises in the property upon the value of which a return is to be calculated in fixing the amount of rates, but held that he was bound by decided cases to hold against his personal views. We are not prepared to hold with the court below as to the increased value which it attributes to the franchises. It is not only too much a matter of pure speculation, but we think it is also opposed to the principle upon which such valuation should be made. This corporation is one of that class which is

subject to regulation by the legislature in the matter of rates, provided they are not made so low as to be confiscatory."

Then the court makes the statement, quoted above, defining what constitutes a franchise, then follows a discussion of the profits of the companies prior to 1885. Under a statutory provision of 1884, the value of these franchises was fixed at the time of the consolidation in that year at $7,781,000, and this court adopted that sum as a legitimate part of the value, because of the settlement in accordance with statutory provisions. The Master and the lower court increased this sum by more than four million dollars, because of the added value described above. But Mr. Justice Peckham, refusing to adopt this increased value, stated:

"Although the State ought to be bound to recognize the value agreed upon in 1884 as part of the property upon which a reasonable return can be demanded, we do not think an increase in that valuation ought to be allowed upon the theory suggested by the court below. Because the amount of gas supplied has increased to the extent stated, and the other and tangible property of the corporations has increased so largely in value, is not, as it seems to us, any reason for attributing a like proportional increase in the value of the franchises. Real estate may have increased in value very largely, as also the personal property, without any necessary increase in the value of the franchises. Its past value was founded upon the opportunity of obtaining these enormous and excessive returns upon the property of the company, without legislative interference with the price for the supply of gas, but that immunity for the future was, of course, uncertain, and the moment it ceased and the legislature reduced the earnings to a reasonable sum the great value of the franchises would be at once and unfavorably affected, but how much it is not possible for us now to say."

The court specifically confines these conclusions to the circumstances peculiar to the *Gas case*, and states that this decision "can form no precedent in regard to the valuation of franchises generally." It would, indeed, be an exceedingly dangerous precedent to establish that companies were en-

titled to a return on any valuation of franchises or rights which they might happen to fix upon at the time of some consolidation or re-organization. But all the peculiar circumstances surrounding the facts in the Gas case, especially the fact that the valuation was fixed under statutory provisions, fully justified the conclusions there reached by the court. The significant fact is the refusal to adopt an increased value simply because of increased value of surrounding real estate, and because of increased business. As the court stated, "Real estate may have increased in value very largely, as also the personal property, without any necessary increase in the value of the franchises." We use these quotations, not because of a desire to force them as a controlling precedent, but solely because of the sound reasoning they give, and the substantial justice such conclusions compel.

The present value of the right-of-way of these railway companies depends solely upon the ability to do railway business, under the rates these companies have been charging, without any limit from the government, either federal or state. Take away this power to charge these rates, and the right-of-way would have no value on any market, it would be an unsalable property.

The theory of the court in ascertaining the value of the right-of-way and terminal grounds in this case, if logically followed, leads us to results that could not satisfy the ordinary judicial mind that justice could be done. It is argued that the proper way to consider the value of a railroad is to imagine there was no railroad in existence and that the terminal grounds and right-of-way were covered with the same character of improvements and property that is found in the town and country through which it runs, and that in the grading of a railroad and all expense in reference to construction at the present day and twenty-five years ago, there is no material difference other than a slight difference in expense as to cross ties. The modern means of moving earth and the improved equipment used in the construction of railroads generally offset the contention of high prices for labor and material, and, taken as a whole, a railroad can probably

be constructed today practically as cheap as it could twenty-five or fifty years ago; and it would seem from our investigation in other cases, that it can actually be built cheaper. In our judgment the court did not use a proper theory in this case of taking an equal amount of ground in the towns through which the road runs, which may be occupied for special or particular purposes, and use values thus found for a similar tract of land to determine the value of terminal grounds, or the opinion of real estate men that sell land for private purposes.

It is claimed by the railway companies that in the acquiring of irregular tracts of land that the severance damages are equal to three times the commercial value of the land for general purposes. This is seldom true in a city because, first, the railroad is built before the city is built, and second, when the tracts are bought in the city, they are usually whole lots and not fractions of lots. If we determine the values of rights-of-way in this manner, instead of imagining one railroad in a town, we should consider the country without any railroads, and putting ourselves in this position, we should determine what it would actually cost to secure the right-of-way for these particular roads. In fact, the cost would not exceed a thousand dollars a mile. If the Great Northern terminal grounds in the city of St. Paul were a vacant space of land with warehouses and elevators thereon, which are now being served, the element for severance damages which is contended for by the carriers would be nothing, but instead thereof they could secure a very high premium to re-establish the facilities as they now are. Hence, this supposition that there is no railroad in a place and what would be the cost of acquiring property if such was the case enters the field of imagination so greatly that it is certainly an impracticable basis upon which to determine the rights of the people at this time or of the generations yet to come. The terminal grounds in the city of Chicago of the Illinois Central were acquired many years ago and were either donated to the railroad or purchased at a comparatively nominal cost. Yet, if the value of the terminal grounds should be determined upon the basis

of the adjoining property in the city of Chicago, or a similar amount of property in the city of Chicago, together with all the buildings thereon, the entire net earnings of the Illinois Central railroad would probably be insufficient to pay interest on the investment represented by the land upon which the terminals are located. If this rule is followed in towns like St. Paul or Minneapolis, it must be followed in towns like Chicago, New York and Philadelphia. It was urged that should a railroad undertake to build into one of these cities at this time that it would cost approximately the amount ascertained upon the basis followed by the court in this case. To this, we answer that railroads do not penetrate the heart of large cities except for competitive reasons and they cannot demand of the public rates for interest on unreasonable expenditures made for such purposes.

If the Illinois Central collected a sufficient amount to pay interest upon the value of its terminal grounds ascertained as above stated, it would constantly have to advance its charges as Chicago grew.

What value should be considered in ascertaining the value of a railroad for rate making purposes because of the location of the road? The particular location of a road has much to do with the value of the road in fact, and influences the price of the stocks and bonds. A railroad may be constructed at times over the only available route to reach particular points. This route belonged to the public. The public granted to this railroad company the privilege of constructing a railroad on this particular location. Notwithstanding the value of the location, the public should not be required to pay interest upon this character of values. A railroad is constructed, large cities are built along the same, and its particular location becomes more valuable because the public builds the cities. Is this a value upon which the public should be taxed? Suppose there is a narrow pass through a range of mountains suitable for the construction of a railroad at a minimum cost, which belongs to, and is controlled by, the public. A railroad company is granted the privilege of building a railroad through the same, connecting great commercial centers.

The value of this pass for railroad purposes can hardly be estimated as compared with another right-of-way at great construction expense over the mountains and with a continuous heavy operating expense. Must the public pay, on the great value of this pass, an annual interest to this railroad that runs through the mountain pass, which has been granted to the railroad by the public? If so, the public should pay rates sufficient to pay interest upon a franchise or the location of a gas or electric plant in any great city, upon which because of the nature of the business, and its location, the particular company has a virtual monopoly, and the public should be taxed upon the value of this privilege.

The consequences of considering "right-of-way" synonymous with "land," and allowing carriers a return not only upon the first cost of the land, but an increase in the same equivalent to all increase in the value of surrounding lands, has seriously alarmed some of our ablest thinkers upon these problems, including distinguished members of our National Congress, and of the Interstate Commerce Commission. In the pending cases the Master and the lower Court were not content with taking the original cost, and adding this increased value of adjacent lands, but they included a "severance damage;" that is, because at certain periods in the growth of any great railroad system a company has to pay more than the value of adjacent lands in order to secure property for railroad purposes, therefore they assume that *at all periods* this is true, and also *for all railroads;* from these facts the lower Court has deduced the principle that all land values must be multiplied by two and a quarter. Although practically all of these railroads were built on land given to them by the government, or on land in an untamed wilderness where no severance damages were ever given or demanded, yet this was allowed for every foot of their right-of-way. Not even content with this, the Master and the lower Court have added an unearned increment to the severance damages; that is the cost of reproduction, carried to its logical conclusion, requires a severance damage of two and a quarter times the cost of the land, this being computed on

the land values of today. Not content with this, we find the Master and the lower Court have a final total for one company which includes the value of large tracts of land that is four times larger than would be necessary for a railroad capable of performing the same service in this locality, as that performed by this company. This all grows out of the fact that large portions of the right-of-way are 400 feet wide, while railroad purposes do not require over 100 feet in width, the balance is surplusage bestowed on this carrier as a gift by the government. It is common knowledge that railroad systems traverse this continent from ocean to ocean on strips of land 100 feet in width. This is the ordinary width in all portions of the country; occasionally we find the right-of-way 50 feet, then sometimes this is found to be several hundred feet wide, but practically the universal rule is to find the right-of-way 100 feet in width.

Without stating in detail the precise methods of computation adopted by the Master, a fair dissection of the same, as outlined above, shows that he has in effect accomplished the following results:

Notwithstanding most of their right-of-way cost these companies practically nothing, yet we find the Master giving them a return upon an estimated cost of such right-of-way, adding to this an increased value equivalent to the increase in the value of adjacent lands. Although this increased value has alone alarmed some of our ablest thinkers upon these subjects yet the Master was not content to stop here. He multiplied this increased value, including a fictitious estimated original cost and the unearned increment, by two and a quarter in order to secure the "severance damages," which thereby includes an unearned increment not only on the land but on the original severance damage, and then for a large portion of the Northern Pacific he in effect multiplies this entire figure by four in order to find the value of those portions of the right-of-way which are four times wider than is necessary to carry on the business of the said company.

The severance damages on 400-foot strips of land are unjust for three reasons:

1st. Severance damage is not a legitimate charge unless actually paid by the company.

2d. Severance damages on a 400-foot strip are not four times those on a 100-foot strip; the tests securing the multiple were on smaller tracts and under conditions entirely different from those actually existing when the railroad was built; and

3d. The company has no need for 400-foot strips of right-of-way to perform their public functions.

Railroads are entitled to no return on severance value, but what they are entitled to a return upon is the value of the property, not original cost, not reproduction cost, but, plainly and distinctly, *fair value*. In this fair value should be included all necessary incidental expenses which these companies can prove they were reasonably compelled to incur which are in addition to the property itself. One of these incidental expenses might be severance damages, so far as proved. The fact is that very seldom have these companies actually paid any severance damages, and the claim is in fact a fictitious one as a general thing. Where they have actually incurred such expenses they are much more than offset by many gifts in the same and other sections. The most that can possibly be claimed is to allow these damages where actually paid, even though they are not properly a part of the present value, and even though they are more than offset by gifts in other sections, as a necessary incident to the actual expense of construction.

If it becomes impossible to find the actual costs of severance paid, although it is clearly true that such damages were paid, then in that case it should be proper to estimate the amount. In these computations we are not dealing with fictitious items, or speculative value, but with facts.

The price a company pays for right-of-way is largely a matter of sentiment. When a company is going into a country where a railroad is needed, the land owner readily yields up right-of-way at nominal prices. At other times, after a railroad is constructed through a territory, and they need additional right-of-way, which is for the purpose of handling

a rapidly growing traffic from many distant quarters, the local land owner feeling that he has nothing to gain by the additional railway construction, holds the price as high as humanly possible, for there is no longer any occasion for him to hold out inducements for the construction. It consequently becomes a simple battle between him and the railway company, and the advantage rests with the land owner. Consequently, the prices for additional right-of-way for a long established property, and the prices for right-of-way including terminal lands in a section already amply supplied with transportation facilities, are as a rule very exceptionally high, when compared to the general average. Such transactions as these form no criterion whatsoever as to what is the ordinary severance damage, or the cost of right-of-way. And both the complainants and the defendants in these cases have adopted these abnormal exceptional instances as their basis for the determination of right-of-way values. It is probable that nine-tenths of the railway mileage in America has been built without the payment of one cent for severance damages. The complainants have adopted the exceptional as the standard for all. There is nothing in this record to show what in fact these companies have paid for severance damages, except on a small fraction of one per cent of their mileage.

On present high values land owners in this section seldom realize above taxes and above maintenance, including repair and depreciation, a return of over 3 or 3½ per cent on the present value of their land.

Judge Sanborn allows a seven per cent return on two and a quarter times the present value of the land which these companies own. This is giving to the railroads fully five (5) times what other people are able to obtain on the same class of land in the same locality.

Judge Sanborn allows a seven per cent return on two and a quarter times the present value of many miles of right-of-way which is four hundred feet wide, or *four times* the width of the land which is actually devoted to public use by the carrier. This is giving to the railroads twenty (20) times

what other people are able to obtain on the same class of land, as that devoted to the public service by the railroads, in the same locality.

RETURN ON COST OF REPRODUCING THAT WHICH HAS COST THE COMPANY NOTHING.

The Public Service Commission for the First District of New York has had occasion to consider the question whether a gas company is entitled to a return upon the cost of paving over mains made subsequent to the time the mains were laid. If *reproduction cost* new is to be strictly construed as the basis, there is no question but what the company is entitled to a return upon this cost; for if the mains had to be laid at the present time that would necessarily be one of the expenses incurred. A recent decision of the New York Commission, written by Mr. Commissioner Maltbie, presents an able discussion of this issue; the case is entitled *John G. Mayhew and others against Kings County Lighting Company,* and involves the rates on gas in one of the Brooklyn wards. The decision was rendered October 20, 1911. The New York Commission decides against allowing any return for the cost of such paving. In the discussion of the question the differences are pointed out between the cost of such paving and the cost of land and yet certain striking resemblances in the basic reasons for this conclusion cannot help but be noticed in the discussion of the various arguments *pro* and *con*. The several grounds for the decision of the New York Commission are: First, that the pavement is not the property of the company, that the company may not alter the pavement without the city's permission, nor sell, transfer, or remove it; and in case the company takes up its pipes, the pavement must be restored. Second, the company did not lay the new paving; it was laid by the city after the company's pipes were in the ground. And, third, the new paving represents no expenditure upon the part of the company. Although these facts are all true, yet *all* of these arguments do not constitute the grounds for the Commission's decision. If the paving were made before the gas mains were laid, and consequently the gas

company had to bear the expense of tearing up and relaying the paving, then the Commission holds that the company is entitled to a return upon that expenditure; that is true although the paving "is not the property of the company." The Commission frankly states: "It is conceivable that a company might not own certain property, might not have actually constructed it, and yet the expense of such construction, if paid by the company, might properly be included in the amount upon which the company would be entitled to earn a fair return."

One is forced to the conclusion that the basic ground for refusing a return on such paving is that the cost of reproduction is rejected as the standard, and the bona fide and necessary investment, or "sacrifice," of the company is adopted in its stead; or that the cost of reproduction is modified in this respect by other elements.

At another place in the said opinion the Commission concedes that "the company should be allowed a fair return upon the cost of repaving the streets when the mains and services were laid, *for that is an expense which they had to incur.*" The last clause seems to express the basic thought in the minds of the Commission.

Mr. Maltbie, in the body of the decision, discusses the force of former precedents upon this issue, and calls attention to the fact that it is still an open question before this court. His handling of the argument of the cost of reproduction as illustrated by the expense which must be incurred by a new competitor is very able. It is claimed, he says, that "if a competing company were to build a gas system, it would be obliged to pay for the existing pavement over its mains and services as it would have to replace it during construction. True! But does it follow that gas rates would in practice be based upon the cost of the most expensive service? Even the maximum to be fixed by law would not of necessity be based upon the cost of the most expensive service. However, this argument is irrelevant because it is the policy of this State that public regulation of rates shall take the place of competition and that unnecessary duplication of plant shall

be avoided. The State is to protect the consumer against unreasonable rates. But if the State must fix rates upon the basis of competitive supply, it is evident that the consumer has lost the advantages of competition and not gained those of monopoly."

The Wisconsin Commission has considered the same problem, and has reached the same conclusions we have just cited in the able opinion of Mr. Maltbie, of the New York Public Service Commission. A typical case is the one entitled *State Journal Ptg. Co. v. Madison Gas and Electric Co.* (4 Wisconsin Railroad Commission Reports, 501, 554, 555), wherein we find the following passages:

> "The engineers, in their valuation, included the extra cost that would have been involved if the gas pipes had had to be laid through paving or after the streets had been paved. This extra cost was placed at $4,046 for the cost of reproduction new, and at $3,903 for the cost of reproduction new less depreciation. The additional cost because of paving is undoubtedly a legitimate item that should be taken into account in determining the cost of reproducing a plant. Whether it should also be included in the valuation of a plant when determined for rate-making purposes, is a question that would largely depend upon whether these expenses were actually incurred, that is, on whether the pipes were laid before or after the streets were paved. If the pipes were laid after the streets were paved, then it would seem that the additional cost because of the paving should be included in the valuation of the plant. If, on the other hand, the pipes were laid in advance of the paving, then equity as between investor and consumers would seem to require the omission of all or the greater part of this cost from the valuation. *The costs of reproduction of the physical property of a plant, while of the greatest importance to that end, is not the only element that should be considered in determining the fair value when questions of rates are involved.* The cost of reproduction constitutes valuable evidence of the amount upon which investors are entitled to reasonable returns, but it does not furnish the only evidence of this amount, even in so far as the physical parts alone of the plants are concerned. To include something in the valuation of the physical property for

the cost of paving, is undoubtedly fair and just when such costs have actually been incurred. *But when they have not been incurred, it is very difficult to find any just and reasonable ground upon which they can fairly be made a permanent charge against the consumers.*" (Italics are ours.)

In a similar manner the Iowa Supreme Court has rejected the cost of reproduction as applied to paving over gas mains. *Cedar Rapids Gas Light Co. v. Cedar Rapids,* 144 Ia. 426, 120 N. W. 966, 970 (May 4, 1909.)

None of these decisions have ever been overthrown by a higher court. We have been unable to find any decision where the issue described, has been raised, and the decision has been different from that of the Iowa Supreme Court, the Wisconsin and the New York Commissions.

The argument against allowing a gas company a return on the cost of paving made subsequent to the laying of gas mains, because such paving does not belong to the gas company, and represents no expenditure on the part of said company, applies with equal force against allowing a return upon severance damages which have never been incurred by the railroad company, and, in no sense, constitute property belonging to the said company. Severance damages at times have to be paid, and are a necessary incident to the construction of a railroad; in such cases, and such cases only, they form a legitimate part of that value upon which a company is entitled to a return.

IMPORTANCE OF BONA FIDE INVESTMENT AS A FACTOR.

If reproduction cost alone was to be the sole test, this Court could very easily have said so many years ago. The whole trend of decisions in the state and national tribunals has been to modify reproduction cost by other important elements. The actual bona fide investment has been repeatedly considered one of the controlling factors, in the decisions of the Supreme Court. A typical passage to this effect is the fol-

lowing to be found in the well known case of *Dow v. Beidelman* (125 U. S 680, 690):

> "The plaintiffs in error do not contend that it is always or generally unreasonable to restrict the rate for carrying each passenger to three cents a mile. They argue that it is so in this case, by reason of the admitted fact, that with the same traffic that their road has now, and charging for transportation at the rate of three cents per mile, the net yearly income will pay less than one and a half per cent on the original cost of the road, and only a little more than two per cent on the amount of its bonded debt. But there is no evidence whatever as to how much money the bonds cost, or as to the amount of the capital stock of the corporation as reorganized, or as to the sum paid for the road by that corporation or its trustees. It certainly cannot be presumed that the price paid at the sale under the decree of foreclosure equaled the original cost of the road, or the amount of outstanding bonded debt. Without any proof of the sum invested by the reorganized corporation or its trustees, the court has no means, if it would under any circumstances have the power, of determining that the rate of three cents a mile fixed by the legislature is unreasonable. Still less does it appear that there has been any such confiscation as amounts to a taking of property without due process of law."

Reproduction cost is one of the most important factors to be considered in determining the fair value upon which a company is entitled to a return; but it is not the only factor, nor can it be said to be the controlling factor. There are other elements which must constantly modify and guide our computations.

The actual bona fide investment has been sought in many cases, which would indicate that it is one of the determining factors of great importance; and to consider the cost of reproduction new as the sole basis is entirely unjust.

Mr. Justice Moody, in the *Knoxville Water case,* said:

> "Before coming to the question of profit at all the company is entitled to earn a sufficient sum annually to provide, not only for current repairs, but for making good the depreciation and replacing the parts of the property

when they come to the end of their life. The company is not bound to see its property gradually waste without making provision out of earnings for its replacement. It is entitled to see that from earnings the value of the property invested is kept unimpaired so that at the end of any given term of years the orginal investment remains as it was at the beginning." (*Knoxville v. The Knoxville Water Co.*, 212 U. S., 1, 13.)

Other extracts from well known decisions to the same effect are as follows:

"The original cost of the works is not accurately and satisfactorily shown. As it would have assisted us in reaching a conclusion—if,in consequence of our ignorance thereof, we have not placed the value upon the property which it deserves—the company is alone to blame, for by the production of its books it could have clearly shown the actual cost of every part and of the whole of this property." (*National Water Works Co. v. City of Kansas City*, 62 Fed. 853, 866.)

"What the company has parted with—what the public has acquired—is the money reasonably and properly expended by the company in acquiring its property and constructing its works. The State has taken the use of that money, and it is for that use that it must provide just compensation." (*San Diego Water Co. v. San Diego*, 118 Cal. 566.)

"Much of the capital was invested between 20 and 30 years ago, and to be able still to realize 6 per cent upon the money originally invested is more than most people are able to accomplish in any ordinary investment and more than is necessary in order to give just compensation for property at the time it is used for the public purpose originally intended." (*Stanislaus County v. San Joaquin & Kings River, Canal & Irrigation Co.*, 192 U. S., 200, 216.)

In the recent *Advanced Rate Cases* before the Interstate Commerce Commission Mr. Commissioner Lane gave the following summary of what he deems the most important factor in the determination of "fair value" upon which a company is entitled to a return:

"The trend of the highest judicial opinion would indicate that we should accept neither the cost of reproduction, upon which the Burlington's estimate of value is made, nor the capitalization which the Santa Fe accepts as approximate value, nor the price of stocks and bonds in the market, nor yet the original investment alone, as the test of present value for purposes of rate regulation. Perhaps the nearest approximation to the fair standard is that of bona fide investment—the sacrifice made by the owners of the property—considering as part of the investment any shortage of return that there may be in the early years of the enterprise. Upon this, taking the life history of the road through a number of years, its promoters are entitled to a reasonable return. This, however, manifestly is limited; for a return should not be given upon wastefulness, mismanagement, or poor judgment, and always there is present the restriction that no more than a resonable rate shall be charged." (*In Re Investigation of Advances in Rates*, XX I.C.C. Reports, 307- 347.)

A recent decision in the federal court has the following passage in it:

"In fixing the measure of rate upon property devoted to public use regard should be had to the character of the business, the locality and the risk; whether the rate would be uniform and secure; whether the patronage is steady or fluctuating and quickly responsive to financial and commercial changes; interest rates, legal and contractual, and rates customarily sought and required in like investments in the locality, making it manifest that value means investment. (*Reagan v Trust Co.*, 154 U. S. 362.)" *Missouri, etc., v. Love, et al.*, 177 Fed. 493, 501, 502.

BETTERMENTS OUT OF SURPLUS.

While this tribunal has no power to control capital issues, yet it can state upon what value a railway company is entitled to a return. One of the complicated problems connected with these issues relates to the question whether a company can charge such high rates that, over and above a reasonable return upon the fair value of its property, it has a surplus which it can put back into the property and make the basis for future rates.

This record shows clearly that the Northern Pacific and the Great Northern companies have spent many millions of dollars out of current income for betterments and improvements. During the past ten years more than fifty millions of dollars have been so expended. These facts are disclosed in their annual reports to their stockholders, which are made a part of the record by concession of parties.

These sums have built improvements in Minnesota. The question as to whether they are entitled to returns on such funds has become one of the great problems of railway economics of the day. See: *"Eastern Advanced Rate Case,"* 20 I.C.C. Rep. 243, 270, *"Western Advanced Rate Case,"* 20 I.C.C. Rep. 307, 334.

This issue was distinctly raised, but not answered in *Commission, etc., v. Telephone Co.*, 212 U. S. 414, 422, 424, 425.

Two typical passages presenting the attitude of the Interstate Commerce Commission are as follows:

> "Assuming the stockholder is only entitled to exact from the public a certain amount for the performance of the service, he clearly has no right to both receive that amount in dividends and add to the productive value of his property. The policy of the Michigan Central has been to make these improvements, not by adding to the debt or the capital stock of the company, but out of its gross earnings as part of the operating expenses." (*Re Proposed Advance &c.* 9 I. C. C. Rep. 382, 414.)
>
> "A railroad is entitled to a fair return upon the value of the property devoted *by it* to the public use, but it is not entitled to have that property paid for by the public." (*Receivers &c., v. C. N. O. & T. P. Ry. Co.* 18 I.C.C. Rep. 440, 462.)

Decisions of this Court and of the Interstate Commerce Commission dealing with issues closely analogous to this are Illinois Central R. Co. v. I. C. C. 206 U. S. 441, and Yellow Pine Lumber Ass'n. v. I. C. R. Co. 10 I.C.C. Rep. 505.

Although this issue is materially connected with the pending Minnesota cases, we do not deem it controlling and we will not take the time to discuss it further.

After an extended review of the many decisions relative to the different classes of companies engaged in public service and their relations to the state, Mr Justice Brewer, in *Cotting v. Kansas C. S. Y. Co.* (183 U. S. 79, 93.) makes a distinction between companies performing the duties of the state, and those engaged in business for private gain, who have placed their property in such a position that "the public has an interest in its use," and in this connection he discusses the relations between the state and such companies, when the latter exercise the functions of the state. In regard to this he said:

> "Now, in the light of these decisions and facts, it is insisted that the same rule as to the limit of judicial interference must apply in cases in which a public service is distinctly *intended* and *rendered* and in those in which without any intent of public service the owners have placed their property in such a position that the public has an interest in its use. Obviously there is a difference in the conditions of these cases. In the one the owner has intentionally devoted his property to the discharge of a public service. In the other he has placed his property in such a position that willingly or unwillingly the public has acquired an interest in its use. In the one he deliberately undertakes to do that which is a proper work for the State. In the other, in pursuit of merely private gain, he has placed his property in such a position that the public has become interested in its use. In the one it may be said that he voluntarily accepts all the conditions of public service which attach to like service performed by the State itself. In the other that he submits to only those necessary interferences and regulations which the public interests require. In the one he expresses his willingness to do the work of the State, aware that the State in the discharge of its public duties is not guided solely by a question of profit. It may rightfully determine that the particular service is of such importance to the public that it may be conducted at a pecuniary loss, having in view a larger general interest. At any rate, it does not perform its services with the single idea of profit. Its thought is the general public welfare. If in such a case an individual is willing to undertake the work of the State, may it not be urged that he in a measure subjects himself to the same rules of action, and

that if the body which expresses the judgment of the State believes that the particular services should be rendered without profit he is not at liberty to complain? While we have said again and again, that one volunteering to do such services cannot be compelled to expose his property to confiscation, that he cannot be compelled to submit its use to such rates as do not pay the expenses of the work, and therefore create a constantly increasing debt which ultimately works its appropriation, still is there not force in the suggestion that as the State may do the work without profit, if he voluntarily undertakes to act for the State he must submit to a like determination as to the paramount interests of the public?

"Again, wherever a purely public use is contemplated the State may and generally does bestow upon the party intending such use some of its governmental powers. It grants the right of eminent domain by which property can be taken, and taken not at the price fixed by the owner, but at the market value. It thus enables him to exercise the powers of the State, and exercising those powers and doing the work of the State is it wholly unfair to rule that he must submit to the same conditions which the State may place upon its own exercise of the same powers and the doing of the same work? It is unnecessary in this case to determine this question. We simply notice the arguments which are claimed to justify a difference in the rule as to property devoted to public uses from that in respect to property used solely for purposes of private gain, and which only by virtue of the conditions of its use becomes such as the public has an interest in." (183 U. S. 79,93, 94.)

Although other members of the court did not concur in certain portions of the opinion by Mr. Justice Brewer, yet there is nothing to indicate any dissent applied to these statements, and much of the foregoing passages must be accepted as an able statement of well recognized doctrines.

The railway company, as Mr. Justice Brewer clearly says, "accepts all the conditions of public service which attach to like service performed by the State itself."

This idea has been frequently stated. Justice Harlan in *Smyth v. Ames,* 169 U. S. 466, 544, speaking of a corporation operating a railroad, or a public highway, said: "Such a cor-

poration was created for public purposes. It performs a function of the state."

A remarkable statement of the relation of principal and agent between the state and the railroad was made by Mr. William H. Vanderbilt of the New York Central, and Mr. Jewett, at one time president of the Erie, in a letter to a committee of the New York legislature, which is contained in a public document published by order of Congress. They said:

> That it is the primary duty of the State to furnish "highways" whether they be the road, the canal, the turnpike, or the railroad, the State alone having the right of "eminent domain."
>
> That this duty has been complied with by the State in most of these ways.
>
> That, for prudential and other reasons, the State of New York preferred to engage the services and capital of her citizens to do what was her duty to do, granting them certain powers under certain limitations and restrictions, which are made part of the contract between these "citizens" and the State.
>
> The State places such "citizens" in her place to perform her duties, and for this purpose clothes them with the imperial right of "eminent domain" so far as may be required to perform the duty devolving upon them.
>
> Such "citizens" so placed have a right to the fullest protection of the State, and to be protected against any laws that the State would not pass if such property of "citizens" had been built by the State itself, and further, such "citizens" should be protected against any legislation that would lessen the value of property so obtained by its "citizens" by reason of their contract with and their willingness to take the place of the State in the performance of one of its highest duties.
>
> The railway company thus holds, in its relation to the state:
>
> First. Its position as a substitute for the State under the powers and limitations of the law; and
>
> Second. The right of pecuniary recompense and of ample protection of property.

If the railroads are a substitute, should we not require the same treatment to the public from the railroads as we should

have required from the State? In other words, as Mr. Thurber of New York has suggested, if the State had built these railroads, the people would have compelled no increase in charges to pay for the unearned increment. The state would have been satisfied with a return upon the investment.

> Again in *Olcott v. the Supervisors*, it is held that: "Whether the use of a railway is a public or private one depends in no measure upon the question who constructed it, or who owns it. It has never been considered of any importance that the road was built by the agency of a private corporation. No matter who is the agent, the function performed is that of the State." (16 Wall. 678, 695.)

The maintenance of public highways has been a function of government, with only an occasional exception from time to time, since the dawn of civilization. A man with a machine has changed all this. A highway is just as much public property, common property, as the air we breathe. One is just as much an essential to our social well being as the other is to our physical well being. If some one should invent a new air for us to breathe, and by means of that he should be able to place the control of the atmosphere in private hands, it would be similar to the monopolization of our public highways by private persons. The power of eminent domain is simply an incident demonstrating in concrete form the public character of the enterprise of building public roadways. Heretofore these highways have been common property. The canal, the river, the lakes, the ocean, the public roads, these have been the property of the public in the past. Highways are of stupendous value. They have determined the location of commercial centers. This gives fabulous commercial value to the terminals of all roads and rivers. It is a serious matter to go contrary to the entire trend of events during all the past centuries, to go contrary to the custom in practically every other great civilized country on the globe, with only one notable exception; it is a matter of serious moment for us to allow private persons to monopolize all increase in the value of our thoroughfares, the increase in the value of public

property. It is but a suggestion of our generation that this great increase in value, which will continue down during the coming centuries as society grows, shall be turned over to private individuals. The possible outcome has already alarmed some profound students of these questions.

There are certain duties which are so clearly a part of the function of government, that the rules controlling those engaged in such pursuits must necessarily differ from the rules affecting the property of those engaged in private enterprises. If people undertake the task of carrying mail, operating the mint, running the police department, or building and operating a public highway they must do so as representatives of the state, with full knowledge as to their corresponding rights and obligations in their exercise of delegated governmental functions.

The true basis for the return to which a common carrier is entitled is not fully and accurately expressed in either the clause "present value," or "cost of reproduction;" it is better stated in the expression "fair value at the present time." The whole question about which the conflict necessarily wages, is as to *what factors are with justice to be included in "fair value."* It would seem to us that the lower Court clearly erred in considering as a part of such "fair value," *severance damages never paid by the said companies, unearned increment on lands donated by the public, betterments and improvements built out of operating expenses and surplus earnings, the cost of bridges and viaducts built at public expense, and the present value of right of way four times as wide as is reasonably necessary for the conduct of the transportation business of the said carriers.*

PART VIII.

THE LOWER COURT MADE A FATAL ERROR IN TAKING COST OF REPRODUCTION NEW, WITHOUT ALLOWING FOR DEPRECIATION, AS THE BASIS FOR HIS CALCULATIONS.

Mr. Otis does not take as his basis the present value of the property. Notwithstanding the plain rule laid down by the court where this issue was clearly raised in *City of Knoxville v. Knoxville Water Company,* 212 U. S. 1, and notwithstanding the Master's own statement of the rule in one place in his report (Nor. Pac. Rec. Vol. 1, p. 218), Mr. Otis uses as his basis not "present value," but cost of reproduction *new.* He makes no allowance whatever for depreciation, and in this alone there is of course a fatal defect in the Master's findings. We believe the doctrine here announced is sound and unassailable.

Mr. Otis offers as his excuse for not making a deduction on account of depreciation, that it is offset by: (1) the solidification of road-bed, embankments, and slopes of excavations; (2) repairs, renewals, additions and replacements of equipment; and (3) working capital. (Nor. Pac. Rec. Vol. 1, pp. 238, 239.)

ADAPTATION AND SOLIDIFICATION OF ROADBED.

Mr. Otis allows for this charge three separate and distinct times. First it comes out of operating expenses; here is where it properly belongs, under the head of Maintenance of Way and Structures and Maintenance of Equipment. The hammering of the cars going over the road-bed pounds it down, solidifies it; and that hammering is paid for in repairs and renewals of equipment. Ballast is constantly renewed, the road-bed is constantly made stronger month by month, and year by year, and these costs naturally and properly find their way

into the maintenance of way and structures account. The adaptation and solidification of road-bed is entirely cared for under operating expenses, it belongs nowhere else, it is not cared for out of the funds in the capital account. It is wrong to make the public pay the costs of solidifying the road-bed out of annual operating expenses, and then compel the public to pay a return upon the value of that which it has already paid for.

Mr. Otis uses this same item—adaptation and solidification of road-bed—again in the figures representing value, upon which the company is entitled to a return. (Nor. Pac. Rec. Vol. 1, pp. 225, 235-237.)

Not content with this duplification, Mr. Otis uses this same item a third time as an offset to depreciation. (See Nor. Pac. Rec. Vol. 1, p. 238.)

This duplification of charges for the same item is inexcusable. It is sufficient to say the proper place for this item, and the place where it is in fact paid by the railway companies, is out of maintenance charges under operating expenses.

REPAIRS, RENEWALS, ADDITIONS AND REPLACEMENTS OF EQUIPMENT.

The above item is the second offset claimed by Mr. Otis against depreciation. Here again we find the grossest kind of duplication. Mr. Otis certainly knows, and if he does not his ignorance is unpardonable after spending several years in the examination and consideration of this case, that repairs and renewals of equipment are included under maintenance charges in operating expenses; and that additions and replacements, if betterments, are charged to the capital account, or, if renewals "in kind," are included under operating expenses.

The record in these cases shows that repairs and renewals are taken care of under operating expenses.

The general method of taking care of repairs and renewals, both of roadway and equipment, under operating expenses from month to month and year to year, is clearly set forth in

the following extract from the cross examination of Mr. Elliott, shown in the Northern Pacific Record at pages 1252 and 1253, which we have had occasion to cite once before in this brief:

"Now, the ties and the rails and the ballast on a railroad, of course, wear out, but in a well organized railroad the wear of your ties, rails, and ballast is taken care of each year by the renewals of those items.

"Q. As an operating expense?

"A. That is charged to operating expenses. There is a class of buildings, of course, that do depreciate; take wooden structures, water-tanks, etc. You might say that the new material in a wooden building twenty years old is not worth as much as it was when it was new. It is true you could not tear it down and sell it to somebody and get your money back, but, as a tool of commerce, it is just as good for us as it was when it was first put up, because it has been painted and repaired and patched up and kept in order. In the Yakima valley we have just the same station structures at some of our stations that we had when the road was put through there in 1886. The only trouble we have is that they are too small, we have got to throw some of them away because they are too small. They have not depreciated, as a tool for doing business, at all, in good order, they have been kept up. The same thing is true in the Yellowstone Valley, we have the same structures there that we had twenty years ago. A good many here in Minnesota. Naturally, as we find the towns grow and we need a better structure, we in common with citizens generally are apt to put up a better type or put up a stone or brick structure, very often, where ten years ago we put up a wooden one, but the depreciation of those wooden structures is taken care of in the same way it is on ties and rail and ballast, by constant repairs and renewals, that go on every day and every week and every month, kept in good order. Take a wooden bridge; we very rarely renew a wooden bridge now. We put in a concrete structure or steel eye-beam, or a concrete arch, or we put in a steel girder or truss. In that case, we charge to operating expenses the entire cost of rebuilding a structure of the kind that is replaced, and the excess we charge to our capital or income account, so we take up in our operating expenses the cost of reproducing the

structure in kind which takes care of all of the possible depreciation and is put into the expenses of the road. Now, on equipment, it is very hard to say what is the depreciation of a modern piece of equipment. It is something, of course. But we aim (and I don't think we differ from others) to keep up our repairs, and all of our equipment, as vehicles of commerce, are just exactly as good for our purposes today as they were when we bought them, and some of them are better. Take a locomotive with us, we generally have to take a year to get it in just the condition we want after it comes from the locomotive builders. It has, so to speak, got to get seasoned; it has got to get used to the water, it has got to get used to the coal, and we think they are better after we have had them a year or two than when we bought them, and we aim to renew them as frequently as is necessary to put in new fire-boxes, new flues, and do all that is needed to keep them in good order, and the reason locomotives are discarded is more because of obsolescence of type rather than depreciation of quality. We have locomotives on the road today that are over twenty years old that are perfectly good locomotives and are pulling trains, but they are too small. The C., B. & Q. had locomotives that were thirty years old that were perfectly good locomotives, but they were too small, and they are thrown away not because they have depreciated in quality but simply because the demands of commerce are so great that we buy a big one and use it instead of a little one."

At the end of Volume One of Northern Pacific Record is given a copy of the abstract of the Annual Report of the Northern Pacific Railway Company to the Railroad and Warehouse Commission of the State of Minnesota for the year ending June 30, 1907. At page 43 of this exhibit under the head of "Operating Expenses," sub-head "Maintenance of Equipment," the following charges are made:

Repairs and Renewals of Locomotives....	$2,173,666.43
Repairs and Renewals of Passenger Cars...	453,507.77
Repairs and Renewals of Freight Cars.....	2,572,218.38
Repairs and Renewals of Work Cars.....	190,066.37

WORKING CAPITAL.

The third important offset to depreciation suggested by Mr. Otis is the cost of, or interest on, working capital required in the operation of a railway property. Mr. Otis gives no definite figures representing this cost, but just puts it forward generally. It is commonly known that these carriers are receiving huge sums daily from their freight and passenger traffic. Distribution of interest on bonds, and dividends on stocks, are generally made semi-annually, thus at all times leaving sums of money in their hands aggregating many millions. As a practical matter it is quite probable that undivided and surplus earnings at all times furnishes sufficient working capital. We have no definite information as to the amount required. The offset is a mere guess on the part of the Master without any specific facts being given in support thereof.

As the other items, solidification and adaptation of road-bed, and repairs, renewals, additions, and replacements of equipment, are clearly allowed as offsets erroneously, we must conclude that the failure of the Master to make a substantial allowance for depreciation is alone a fatal defect in his computations.

A common argument, and one suggested by Mr. Otis, against any allowance for depreciation, is the assertion that if a company should be entitled to take care of depreciation out of repairs and renewals, and to keep its property constantly up to 100 per cent efficiency, or up to its value *new*, there should be no deduction for depreciation. There is a clever syllogism in this logic, which is not hard to locate. It is true a company should be and is permitted to keep its property out of operating expenses, up to 100 per cent efficiency, but that 100 per cent refers to its original cost. In practical railroading every piece of equipment and structure, every car, every engine, every tie, every rail, and wooden structure has a limited life. Suppose a company has 1,000 freight cars, new, with an average life ahead of them of 20 years. Out of a so-called depreciation account, or under the heading of repairs and renewals, all

being classed as operating expenses, that company is entitled to set aside a certain per cent each year to be expended for new cars to take the place of the original 1,000 cars, so that at the end of twenty years the company will still have its 1,000 cars, new, in value. At all times during that 20 years the value of its cars should equal the value of the original 1,000 cars new. This causes the company to constantly buy new cars, so that at any given time the depreciated value of its original cars plus the value of its new cars, will, combined, equal the value of the original 1,000 cars, new, which is thereby maintaining the property to 100 per cent efficiency. As a result along about the nineteenth or twentieth year the company would have almost 2,000 cars on hand. If at that time a valuation was made of these 2,000 cars new, you would have a value almost double the value of the original 1,000 cars, and almost double the actual present value of the 2,000 cars. The condition of that road in its twentieth year is substantially true of every railroad property in the country at this moment. These companies all have old cars and new ones. If you undertook the appraisal of any car equipment in the country today at its present value you would allow for depreciation; if you took the value of all their cars *new* you would secure a valuation almost double its present value. These same facts are equally true with reference to all the rest of railroad equipment. No railroad property, whether buildings, ties, rails, platforms, scales, or anything else, outside of road-bed and real estate, is equal at the present time to its value new. If you allow for appreciation in land values and fail to allow for depreciation in buildings, rails, ties, cars, locomotives, etc., etc., your conclusions are unjust.

Engineer of Northern Pacific allows for Depreciation.

In the case of *Spokane v. Northern P. Ry., et al.*, 15 I. C. C. Rep 376, 395, 396, the engineer of the Northern Pacific, himself, deducted $14,000,000 as representing depreciation, from the cost of reproduction, *new*, in order to obtain the figure representing present value.

Carbuilders recognize Depreciation Charges.

The carbuilders recognize the factor of depreciation in estimating values, as shown in Mr. Johnson's testimony on behalf of the Northern Pacific:

> "Q. Take box cars, for example, or freight cars generally, are there well-recognized rules for estimating the cost?
>
> "A. There has been a great deal of discussion in regard to this question of depreciation of equipment.
>
> "Q. Well, I meant to get at the base, in the first instance; I was not intending to speak of the rate of per cent of depreciation that should be used; I was thinking of the master car-builders' rules for establishing the value of cost of cars.
>
> "A. Yes, sir, the master car-builders' rule is, as I remember it, six per cent per annum, figured as depreciation, in the event of the loss of a car on another line and its payment to be provided for by the line causing the wreck.
>
> "Q. They have rules, also, fixing the value of the car—
>
> "A. Yes.
>
> "Q. —taking into account its value as new, and a depreciation depending upon the number of years it has been used?
>
> "A. Yes, sir." (Nor. Pac. Rec. Vol. 1, p. 3254.)

The Northern Pacific, in accordance with the Rules of the Interstate Commerce Commission, has made allowance for Depreciation in Value in their own accounts.

The following extract is taken from the report of the Northern Pacific Railway Company to its stockholders for the year ending June 30, 1907:

> "The Equipment Account of the Company represents the fair value of all equipment belonging to the company on June 30, 1907, after making full allowance for depreciation in accordance with the principle laid down by the Interstate Commerce Commission. The charge of $5,926,753 is arrived at by computing the depreciation to

June 30, 1907, of all equipment owned by the Company on September 1, 1896, and purchased and built since then."

The Engineer for the Minnesota Commission allows for Depreciation.

Complainant's (the carriers') Exhibit Morgan (shown in record in Northern Pacific Exhibits following Comp. Exhibit Johnson 64), gives a copy of the report of the Commission's Engineer in charge of the valuation of the Minnesota railroads. The engineer, whether right or wrong on other matters, states very clearly the importance of the depreciation item in a valuation accounting. That portion of his report dealing with this topic is as follows:

> It therefore became necessary to find:
>
> First: The cost of acquiring presently the lands and other real estate owned and occupied by the railroad companies for railway purposes, also the cost of reproducing new the physical elements entering into the construction of the lines with all appurtenances; assuming that the location, environments and conditions affecting each railway and governing such costs of acquirement and reproduction are as they exist today.
>
> Second: To establish the depreciation in the value of the physical properties due to the effect of the elements and to the wear and tear by use, to be determined from an actual examination of the railways, thus enabling a personal knowledge of the standards of construction and maintenance and of the conditions affecting each property.
>
> The results obtained from these methods of procedure will be referred to as:
>
> First: "Cost of Reproduction."
>
> Second: "Present Value of the Physical Properties."
>
> PRESENT VALUE OF PHYSICAL PROPERTIES.
>
> The plan of procedure for this appraisal, as outlined in the letter of instruction and embodied in full elsewhere in this report, contemplated that the railway companies would, in addition to the estimates of the cost of reproduction, prepare data and estimates of the present value of

the physical properties involving such modification of the figures of reproduction costs new, as might reasonably be attributed to the action of the elements and to wear and tear by time and use.

With few exceptions this data was omitted in the reports submitted by the railway companies and while no specific reasons were assigned for the omission of it, sufficient data and information is at hand to indicate that unanimity among the railway officials, as to the elements proper to be considered in making up an estimate of the present value of physical properties, did not exist.

It is not unlikely that the divergence of views, which, from the standpoint of the railway companies and as a matter of record, might prove inexpedient in any application ultimately made of the data, was in some instances perhaps more responsible for its lack of inclusion than the alleged impracticability claimed in other instances.

The opinion is entertained by some that there is no depreciation in the physical properties of a railway, but that as a working tool, its efficiency as maintained, is at all times the equivalent of the new and that a specific facility is in some instances worth less than its reproduction cost, only because in the progress of time and development it has become inadequate for the purposes required of it; and again it is expressed that an old road through thorough maintenance and for other numerous and good reasons, is more serviceable and valuable than a new road.

It is entirely tenable that the value of an economically constructed, judiciously financed and efficiently managed railway property, or the contra thereof, is not measured by its cost, and, for the instant, it seems necessary to recur to the elementary that cost and value are not synonymous and that the determination of the present value of the physical properties, using reproduction cost as a basis, bears no relation to value in the sense of utility, or as an investment.

In view of the principles laid down in Michigan and Wisconsin in respect to the determination of the present value of the physical properties of railways, some of which were established conjointly by the authorities of those States and the representatives of the railways, leads to the opinion that where the application of "value as a utility," "value as an investment," or even "cost of reproduction" to be made the basis for taxing railway prop-

erty in Minnesota, it is not improbable that further evidence would be at command more nearly in harmony with the theories advanced and the methods employed, in the estimation of the present value of the physical properties as prepared and herewith submitted for your consideration.

While it would have been helpful and useful, had the railway companies incorporated the data in their estimates, its omission has led to no embarrassment in the prosecution of the work, as the very thorough examination made of the physical properties of the railways of the State assured the data necessary to reach a determination.

In measuring the present value of the physical properties of railways, it is recognized that in many respects it is difficult to administer by other than arbitrary bases of computation which, in the light of such known facts concerning service conditions, standards of maintenance and the action of the elements, appear to be reasonable and fair.

A brief analysis of the interpretation placed upon present value and the manner in which the work was carried out in this appraisal, would be more useful here than to enter upon a discussion of the details of the computations.

It is understood and admitted that lands generally appreciate in value. There are some exceptions to this rule, such as the recession in the value of certain property in growing cities which is sometimes quite marked; the cutting of timber on lands not susceptible of agricultural or other development, or, the working out of an industry which during its period of activity created temporary communities, a condition particularly true of the mining and lumbering industries; these are local, however, and do not measurably affect the upward trend in the value of property when viewed from a more comprehensive standpoint, and which a retrospect of the material progress and development of the State discloses.

Recognition has been given in this appraisal to the fact that an old road-bed is worth more than a new one. Ballast, while it may show superficial loss of volume by settling into the road-bed, nevertheless, performs at all times the indispensable function of supporting the track superstructure to the full measure of its cost. The elements of cost represented in labor and administration are

not subject to change such as the expenditure for grading, clearing and grubbing, track laying and surfacing, engineering, superintendence, legal expenses, etc.

All of the other elements entering into the physical properties depreciate either by the action of the elements or from wear and tear by use. Ties rot rather than wear out; rails wear rather than rust out, and cars both wear and rot. An analysis of the elements which may be regarded as susceptible of depreciation shows, broadly speaking and measured in dollars and cents, about an equal division in the charges attributable to the elements and those due to wear and tear by use.

By reference to the estimates of the cost of reproduction which also show the present value of the physical properties, the items against which depreciation has been charged are made apparent from a comparison of the figures. The details and formulae upon which the present value of the physical properties have been marked out, are included in the appendices transmitted with this report.

In this case the railway companies presented figures showing cost of reproduction new. They made no claim whatsoever that they had deducted in these figures any sums for depreciation. The Master in almost all instances adopted the figures in their entirety, which were offered by the railroads. There is only one substantial exception to this, and that difference did not purport to be for the purpose of taking care of depreciation, it related to land values, the railroads claiming three times the market value of neighboring land, the Master allowed 75 per cent of this, making a final figure representing land values just (2¼) two and a quarter times the market value of adjoining lands.

Mr. Otis frankly concedes the basis he has adopted in the following language:

"The Master is thus confirmed in his opinion that the cost of reproduction new is the fairest and most equitable basis upon which to predicate rates, both for the carrier and the public, and he has accordingly adopted it in these cases." (Nor. Pac. Rec. Vol. 1, p. 243.)

This we believe is unjust and unlawful.

The propositions we rely upon in this connection have been recognized definitely by this court. In fact we have been unable to find a solitary case ever tried before this tribunal, when this issue was raised, in which it was even seriously contended by any one, either litigant or court, that cost of reproduction, *new*, was the correct standard.

In the case of *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, the attorneys for the Company frankly conceded depreciation should be deducted. The confusion arose over whether depreciation had in fact been allowed by the Master, the attorneys for the company contending that the value found by the Master was of March 30, 1911. "This valuation," says Mr. Justice Moody, in rendering the opinion of the court, "was determined by the master by ascertaining what it would cost, at the date of the ordinance, to reproduce the existing plant as a new plant. The cost of reproduction is one way of ascertaining the present value of a plant like that of a water company, but that test would lead to obviously incorrect results, if the cost of reproduction is not diminished by the depreciation which has come from age and use. The company contends that the Master, in fixing upon the valuation of the tangible property, did make an allowance for depreciation, but we are unable to agree to this. The Master nowhere says that he made allowance for depreciation and the language of his report is inconsistent with such a reduction. The figures which he adopts are those of a fair contractor's price. The basis of his calculation was the testimony of an opinion witness called by the company. That witness submitted a table, which avowedly showed the cost of reproduction, without allowance for depreciation. The values testified to by him were adopted by the Master in the great majority of cases. The witness's valuation of the tangible property was somewhat reduced by the Master, but the reductions were not based upon the theory of depreciation, but upon a difference of opinion as to the reproduction cost.

"The cost of reproduction is not always a fair measure of the present value of a plant which has been in use for many years. The items composing the plant depreciate in value from year to year in a varying degree. Some pieces of property, like real estate for instance, depreciate not at all, and sometimes, on the other hand, appreciate in value. But the reservoirs, the mains, the service pipes, structures upon real estate, standpipes, pumps, boilers, meters, tools and appliances of every kind begin to depreciate with more or less rapidity from the moment of their first use. It is not easy to fix at any given time the amount of depreciation of a plant whose component parts are of different ages with different expectations of life. *But it is clear that some substantial allowance for depreciation ought to have been made in this case.*" (*Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 9, 10.)

It was further contended by the representatives of the Knoxville Water Company that "in fixing upon the value of the plant upon which the company was entitled to earn a reasonable return the amounts of complete and incomplete depreciations should be added to the present value of the surviving parts." By adding past depreciation to present value you would obtain, as your standard, cost of reproduction, new. This claim of counsel however was also rejected. It was urged that in the past allowances had *not* been made from year to year out of operating expenses to take care of this depreciation. In reply to this Mr. Justice Moody stated: "The company is not bound to see its property gradually waste, without making provision out of earnings for its replacement. It is entitled to see that from earnings the value of the property invested is kept unimpaired, so that at the end of any given term of years the original investment remains as it was in the beginning.....

"If, however, a company fails to perform this plain duty and to exact sufficient returns to keep the investment unimpaired whether this is the result of unwarranted dividends upon over-issues of securities or of omission to exact proper prices for the output, the fault is its own. When therefore, a

public regulation of its prices comes under question the true value of the property then employed for the purpose of earning a return cannot be enhanced by a consideration of errors in management which have been committed in the past."

The failure to make proper allowance for depreciation in determining the present values of the properties of the defendant carriers in this case, like the similar failure of the Master in the *Knoxville Water Company case, supra*, is a fatal defect in the Master's findings and the lower Court's decision, and the cases should be reversed for failure to determine this factor, and to make proper deduction therefor.

PART IX.

THE MINNEAPOLIS AND ST. LOUIS RAILROAD COMPANY CAN NOT BE ACCEPTED AS THE STANDARD FOR THE DETERMINATION OF THE ISSUES INVOLVED IN THESE CASES.

In discussing the issues presented in these cases we have confined our remarks largely to the Northern Pacific and Great Northern companies as being representative carriers in the territory concerned.

It is probably true that competition will force the Minneapolis & St. Louis Railroad Company to adopt the rates prescribed for the Northern Pacific and Great Northern companies regardless of what orders the Minnesota authorities might see fit to make.

Counsel for the carriers insisted at the conclusion of their printed argument before the lower Court, that no order could stand which would not permit rates that would yield a reasonable return upon the fair value of the property of the M. & St. L.; this argument will probably be repeated before the Supreme Court, and for that reason we will consider it briefly at this time.

An important passage in the carriers' brief in regard to this subject is as follows:

> "It clearly appears in the case of the Minneapolis & St. Louis Railroad that upon any reasonable valuation, and upon any reasonable basis of apportionment of operating expenses as between local and interstate traffic, the rates in effect prior to the enactment of these Acts and the promulgation of these Orders did not produce a revenue which was a fair or reasonable return upon the property, and therefore any compulsory reduction whatever would violate the Fourteenth Amendment of the Constitution." (Brief of Mr. Holden and others before the lower Court, p. 638.) And therefore, they conclude, the orders cannot stand as to any company.

We do not believe the Minneapolis & St. Louis Railroad Company is entitled to the ordinary return which the average property in this territory is entitled to receive. If that be true the M. & St. L. must be accepted as the standard for all, because competitive conditions, regardless of statutory clauses, will always force this company to adopt the standard of rates prescribed for the strong lines.

The Minneapolis & St. Louis Railroad operates under a tremendous handicap. In the territory it traverses it comes in competition with great systems connecting large terminals in the direction in which the bulk of traffic moves. The M. & St. L. is a north and south line, these other railways are east and west lines.

The contrast between these representative carriers which handle the bulk of the business, and a weak line like the M. & St. L., is somewhat correctly described by the Master at page 244 of Nor. Pac. Rec. Vol. 1, and the following pages. One important factor omitted by the Master is the division of the earnings on through business in order to properly maintain a feeding line of that character.

A concrete illustration of the poor financial condition of this company is the fact that in view of the testimony the Master allowed 10 per cent interest during construction to the M. & St. L., while he allowed only 4 per cent to the Great Northern and the Northern Pacific. Further illustrating the weak character of this property is the fact that during the past ten years the volume of traffic it handles has been decreasing, while that of practically all the sound properties of the country have increased. From 1900 to 1909 the number of revenue tons per train increased: 32 per cent on the Northern Pacific; 41 per cent on the Great Northern; 71 per cent on A. T. & S. F.; 96 per cent on the C., B. & Q.; 37 per cent on the C., M. &. St. P.; while it decreased on the Minneapolis and St. Louis.

If a railroad company hopes to compete on a par with the carriers of today it must have a track going in the direction in which the traffic moves, it must have main lines connecting the great markets, and it must have feeders gathering the busi-

ness from small outlying communities. These are the great essentials in addition to all the ordinary facilities capable of giving prompt efficient service at reasonable prices. If a railroad lacks these essentials, the stockholders must suffer, and not the public.

If the position taken by the railway companies, in this respect, is sound, then all the carriers, in all the states, will be justified in contesting all reductions which are not based on the needs of the weak lines. Competitive conditions, over practically the entire country, will force the small lines to adopt the rates prescribed for the strong lines.

If their position is sound, then all the carriers in all portions of America should be permitted to advance their rates until the revenue is sufficient to yield a profit on the property of the weak lines; and if permitted to do so this is precisely what will occur just as rapidly as the large systems are able to get together on a uniform plan of action.

This would be diametrically opposed to what occurs in all other branches of human industry. Charges in the grocery business, in the steel business, in the oil business, in the manufacturing business, etc., etc., are based upon what will yield a profit on the property of the strong company. Ninety per cent of the traffic in this country is handled by the strong lines.

We must profit by the wisdom of the wise, or else we will be a generation of doddering fools, with the weak and blundering as our standard bearers. The successful sets the pace in war, in politics, in education, in art, in business, in all human life. If we frame our laws suited to the needs and demands of the unsuccessful we will have to reverse the law of evolution, and inject a new principle into the universe—the principle of the survival of the *un*fittest.

The weak line basis places a premium upon incompetence instead of ability, on shortsighted, mistaken policies, in place of those founded on shrewd foresight and solid business sense.

Such a standard as that when merely stated, must be abandoned because of its own plain, unmistakable, unqualified injustice.

The sound railway financiers of the country themselves have long since abandoned such a theory.

In the "*Western Advanced Rate Case,*" Mr. Commissioner Lane, commenting on this precise issue, stated:

> "A strong plea is made on behalf of what are known as the poorer roads in this territory, among them the Minneapolis & St. Louis and Iowa Central lines. It is almost axiomatic that rates cannot be made so as to give high earnings to a poorly placed, indifferently operated, or isolated road without making the rates absolutely extortionate. The rate per ton per mile on the Minneapolis & St. Louis is higher than on any other line in that territory, and yet its operating income per mile of road operated only averaged $1,500 for the last 10 years. It paid an average interest of $1,050,801 during these 10 years on a funded debt of $21,991,824, or about 5 per cent. In other words, it paid 5 per cent on a valuation of approximately $30,000 per mile. Its operating income of $1,222,698 average for the 10-year period yielded about 6 per cent on a valuation of $30,000 a mile.....
>
> "There is no way by which such a condition can be remedied unless the government makes a direct appropriation for the support of roads in this condition. They stand alone, unconnected with any great system and unable to command traffic at either end of their lines." (20 I. C. C. Rep. 307, 377.)

Judge Archibald has well said:

> "The supposed advantage in competing lines between the same points becomes a detriment if rates are to be kept up to help the weakest road."

The constitution, as interpreted by this Court, only protects a company in securing a *reasonable* return. A reasonable return for one company may not be reasonable for another company. In passing upon such issues as are here presented, the government should consider mainly the effect of the rates on what President McCrea has styled "the properly organized,

properly capitalized company operating where properly needed." If the rates, so prescribed, affect injuriously a poorly organized company owning a property built in an unwise manner, then that hardship is one brought upon it through the fault of the company itself.

The public is entitled to demand that the weak line shall charge only such rates as will be adequate for the properly organized company, operating the well built property, where properly needed.

For these reasons we have confined our discussion chiefly to the effect of the rates on those representative carriers handling the vast bulk of the traffic in the State of Minnesota.

RECAPITULATION.

The problems we are considering are intricate and complicated. We recognize full well the important services our railroads are rendering to all industry. But the investments which have been made in these properties have not been made for philanthropic purposes. After all it is purely a business problem, fraught with grave economic questions as to what shall be the wise policies to pursue. But the wisdom or expediency of these courses of action is not the question before this Court. Here the issue relates solely to the power of the Minnesota authorities to do what has been done, the wisdom of such action being a legislative, not a judicial, question.

It might be well if we could re-cast this government, abolish the states, and have one great centralized authority here in Washington ruling the entire nation. But uniformity is not the only thing of which we are in search, especially where conditions are not uniform. And even if it were, this is not a constitutional convention. The great issue in this case, the one with which fully nine-tenths of this voluminous record is concerned, relates to the constitutionality of the proposed Minnesota rates under the Fourteenth Amendment.

In the Northern Pacific case the Master found a total return from state and interstate business of 6.021 per cent upon the value of the property in Minnesota; on the Great Northern he found a total return of 5.909 per cent. In these totals he has failed to include the proper share of earnings from interstate traffic, judged first, by the formal recommendation of the Board of Directors of the Northern Pacific Ry. Co., as to the proper division of earnings between main lines and feeders; second, by the decisions of the Interstate Commerce Commission; third, by the voluntary contracts of the railway companies themselves as to the division of earnings between main lines and feeders; and fourth, by the ordinary rules of accounting. Apportioning values according to such revenue totals causes a grossly exaggerated value to be charged to state business. In the value upon which the foregoing rate of return has

been computed the Master has included gifts to the carriers, the cost of viaducts and bridges built by the public, the unearned increment upon land values, fictitious land values several times the present market value of adjoining lands, and the entire value of costly terminals which are used by the whole system business. In this value the Master and the lower court have totally failed to make any allowances whatever for depreciation, a method which is absolutely unfair and unjust and has been repudiated by this court. Notwithstanding these far reaching and fundamental mistakes upon the part of the lower court and the Special Master, unjustly creating a grossly exaggerated value, coupled with low earnings, yet we find the rates of return to be in the one case 5.909 per cent, and in the other 6.021 per cent.

We challenge the learned counsel for the carriers in these cases to name one solitary reasonably well established representative railroad company in America which has been paying dividends of 6 per cent during the past few years, whose stock is not selling above par. There is not one such company —that means the public declares 6 per cent to be more than a reasonable rate of return.

The method of apportionment of expenses and values between state and interstate business made by the lower Court renders his conclusions as to the return on state business entirely worthless, even had his other figures commanded any serious consideration. His arbitrary ratio of 2½ to 1 is founded solely on opinion testimony, where concrete facts could have been established. His separation of value on the revenue basis is wholly without foundation either in reason, or in the decisions of this Court.

In place of statistics the carriers have offered us opinions and guesses. Mr. Elliott's remark on cross-examination could well be applied to the bulk of the record, when he stated: "I could make a guess, but after I have made a guess, why I wonder if I have guessed on the right basis." (Nor. Pac. Rec. p. 1301.)

However, there is another phase of these issues which is of far greater importance to the state of Minnesota and to all other states involved in this kind of litigation than the withholding or distorting of statistics in these particular cases; that is the adoption of basic methods and doctrines for the interpretation and application of figures produced, which are fundamentally wrong. It is the latter phase of these problems that has, in the main, commanded our attention throughout this discussion.

Several of the methods of accounting adopted by the lower Court, following the Special Master, are vicious in the extreme. We have discussed these thoroughly in the body of the brief and will not repeat at this time. Their adoption may have been due entirely to the ignorance of the Special Master, his lack of familiarity with this class of problems, which is simply an argument in support of a special tribunal to deal with this kind of cases. Upon the other hand, it would seem occasionally, that the Master himself must certainly have known his positions were untenable. This is not true as to Judge Sanborn, because he has made no special investigation, but has placed implicit reliance upon each and every conclusion of the Master.

The essential facts, necessary to the determination of the issues in these cases, could have been presented in testimony covering but a fractional part of this enormous record we have before us. Thousands of pages are devoted to the elucidation of delicately contrived theories, where a page of concrete statistics would have given the actual facts.

The carriers upon whom has rested the burden of establishing the facts, have totally failed to present any facts showing what returns investors are actually securing in this or any other line of business, in Minnesota or anywhere else; but in lieu thereof we have scores of pages devoted to generalizations about the business. We have here no actual facts upon which to base any sound conclusions as to what is a reasonable rate of return.

The record is deficient in that it wholly fails to present the basic figures showing the volume of interstate and state traffic, respectively, moving in through and local trains, and other units of service; from which data, substantially reliable information could have been obtained as to the relative costs of doing state and interstate business.

The record is wholly deficient in that it fails to give any facts upon which to predicate a just division of the values of the properties of the carriers in Minnesota, devoted to state and to interstate business; but the lower court guesses at such division on the revenue basis, a basis which is unjust, unreasonable, and has been specifically rejected by this court.

The lower court included in his estimated cost of reproduction many factors which should have been omitted.

The lower court erred fatally in taking as the basis of his computations the cost of reproduction *new*, without allowing for depreciation.

If these propositions we have stated are true, or if any one of them is sound, the conclusion of the lower court must be rejected.

The lower court erred in exercising substantially the function of an appellate railroad commission, instead of attempting to find if the state authorities had exceeded their powers, had pursued wrong methods, adopted fundamentally erroneous principles, or reached conclusions which could not have been arrived at by a body of ordinary reasonable men.

The interpretation of the Fourteenth Amendment, as made by Judge Sanborn and other district and circuit courts in recent years is revolutionary.

We find no clause in the Fourteenth Amendment to the Constitution limiting its application to railroads, or to any other single class of business. It is broad, it covers all lines of industry.

Why would it not be well for you to determine the reasonableness of tariff rates along with the rest of your duties? You might make an exhaustive, comprehensive, technical investigation into the relative cost of manufacturing here and abroad, determine to what reasonable profit a manufacturer is entitled, whether under a proposed change in the tariff rates it will leave such a reasonable profit; if not, then of course such new rates must be declared confiscatory.

In the meantime, during the leisure moments of this distinguished tribunal, you might determine the reasonableness of the rates of interest in the different states of the Union. Of course the circumstances surrounding the loaning of money are quite different from the operation of railroads. That means what would be reasonable for one might not be reasonable for the other. The Fourteenth Amendment, however, covers both. The Supreme Court will have to make a careful analysis of what is reasonable for a man to earn on money in different sections of the country, critically examine the laws in the different states, today and as they are amended from time to time, reverse its former decisions, and proceed to determine the reasonableness of rates of interest fixed as maximums in the various states. Outside of fixing tariff rates, railroad rates, and rates of interest, which will cover the legislative regulations of most of the industries in which the human animal happens to be engaged these modern days, the Supreme Court may have a day now and then to devote to the comparatively trivial and unimportant functions of interpreting the constitution, as provided by our fathers.

If the Supreme Court does not desire to become the Supreme Legislature of the United States, for both the states and the Congress, it must confine its activity under the Fourteenth Amendment to the determination of whether or not legislative regulations of the character under consideration are confiscatory. Then there is definite harmonious action on the part of the various functions of the different departments of the government. Of course the people will make mistakes from time

to time. But they must be permitted to work out their own salvation. It is better so. The Granger laws of early days were sustained by this court on the ground that the wisdom or expediency of such legislation was not for this tribunal to determine, that the people constituted the proper court to whom they should address such grievances. What was the result? The people were consulted. The facts were frankly, openly laid bare, and one after the other, the legislatures of Iowa, then Wisconsin, and Illinois, repealed the Granger laws. There was no violence done to our system of government. There was no heated excited agitation against the courts which always has and always will undermine the confidence in, and respect for, the law; as it ever has been and as it ever should be. Today the lesson of the Granger days should guide us in our deliberations upon these issues. The wisdom of limiting the return of these carriers to 4 per cent or 6 per cent is for the legislature and not for the courts to determine. Years after the Granger cases had thoroughly established the relative functions of courts and commissions, Judge Brewer, at circuit, was called upon to decide the case of *Chicago & N. W. v. Dey*. If ever it would seem a court might act in restraint of the legislature, that was such a case. Justice Brewer found a return of less than one per cent, but he forbore taking upon himself the function of the legislature. What has followed? No railroads in America have been more uniformly prosperous than the very companies he had under consideration at that time. It is best that the courts should recognize their true functions, thus will they continue to command the confidence and support due their exalted position in our system of government, unprecedented in all history.

Whether the orders of the Minnesota authorities, acting deliberately, under complete statutory authority, after due notice and full hearing of all parties, were "beyond all reasonable doubt so flagrantly unjust" as to be "confiscatory," and therefore in violation of the constitution, as interpreted by

the decisions of this Court, is the chief issue for your consideration.

Respectfully submitted,

NEBRASKA STATE RAILWAY COMMISSION,
IOWA BOARD OF RAILROAD COMMISSIONERS,
KANSAS PUBLIC UTILITIES COMMISSION,
SOUTH DAKOTA RAILROAD COMMISSIONERS,
BOARD OF RAILROAD COMMISSIONERS OF NORTH DAKOTA,
CORPORATION COMMISSION OF OKLAHOMA,
MISSOURI RAILROAD AND WAREHOUSE COMMISSION, and the
RAILROAD COMMISSION OF TEXAS.

CLIFFORD THORNE,
H. T. CLARKE, JR.,
GEO. A. HENSHAW,
JOHN MARSHALL,
ROYAL C. JOHNSON,
P. W. DOUGHERTY,
GRANT G. MARTIN,
U. G. POWELL,
J. H. HENDERSON,
DWIGHT N. LEWIS,
WILLIAM D. WILLIAMS,
W. H. STUTSMAN,
H. R. OGLESBY,
Of Counsel.